Supreme Court, U.S.
FILED

091552 JUN 15 2010

OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

WILLIAM DRISCOLL,

Petitioner,

v.

CB RICHARD ELLIS, INC., *et al.*

Respondents.

Petition for a Writ of Certiorari to the Supreme Court for the State of California

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS R. SHEPHERD
Counsel of Record
EDWARD S. ALEXANDER
Shepherd Abbott Alexander
1616 Cornwall Avenue, Suite 100
Bellingham, WA 98225
(360) 733-3773
dougshepherd@saalawoffice.com

Attorneys for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

On summary judgment, do this Court's precedents on due process and equal protection reject the use of a "more likely" standard of review in disability discrimination cases and forbid trial and appellate courts from resolving genuine issues of material fact regarding the "pretext" analysis?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing before the California Appeals Court and California Supreme Court:

Petitioner William Driscoll was plaintiff-appellant in the California case. Respondents CB Richard Ellis, Inc., Mark Read, Jeffrey Woolson, and William Chillingworth were defendants-appellees in the California case. William Chillingworth was dismissed as a defendant before summary judgment. Provident Life and Accident Insurance Company ("Provident") and Unum Group ("Unum") were original defendants in the California action; however, Petitioner William Driscoll's claims against Provident and Unum were settled and dismissed in the California case.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 8

1. The Due Process and Equal Protection Clauses do not allow the weight of evidence to be determined at summary judgment 8

2. The Due Process and Equal Protection Clauses require a meaningful hearing 9

3. Driscoll provided material disputed facts in response to CBRE's motion 10

ARGUMENT AMPLIFYING REASONS 14

CONCLUSION 17

APPENDICES

Supreme Court of California, Petition for Review Denied A-1

Court of Appeal, Fourth Appellate District, Division One, State of California, No Change in Judgment A-2

Court of Appeal, Fourth Appellate District, Division One, State of California, Opinion....A-4

Superior Court of California, County of San Diego, North County Division, Judgment After Order Granting Summary Judgment.A-46

Superior Court of California, County of San Diego Central, Minute Order A-48

Superior Court of California, County of San Diego, Hall of Justice.....A-75

Court of Appeal, Fourth Appellate District, Division One, State of California, Excerpt from Rehearing Petition A-77

February 23, 2006 Resignation Letter of Bill Driscoll A-80

November 19, 2002 Facsimile Transmission of Mia Bagaybagayan A-82

Superior Court of California, County of San Diego, North County Branch, Declaration of William P. Driscoll.....A-83

Superior Court of California, County of San Diego, North County Branch, Declaration of Dennis Carlo A-111

Superior Court of California, County of San Diego, North County Branch, Declaration of Barbara Kiley.....A-118

Superior Court of California, County of San Diego, North County Branch, Declaration of Mark Read.....A-124

Superior Court of California, County of San Diego, North County Branch, Fifth Declaration of Douglas R. Shepherd Re the Depositions of Mark Read.....A-136

Superior Court of California, County of San Diego, North County Branch, Second Declaration of Douglas R. Shepherd re the Depositions of Peter Rooney A-162

UNUM Questionnaire re William Driscoll, completed by Mark M. Read.....A-188

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 8, 10

Armstrong v. Manzo,
380 U.S. 545 (1965) 16

Boddie v. Connecticut,
401 U.S. 371 (1971) 9

City of Cleburn, Tex. v. Cleburn Living Center,
473 U.S. 432 (1985) 6

Goldberg v. Kelly,
397 U.S. 254 (1970) 16

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 16

Jenkins v. McKeithen,
395 U.S. 411 (1969) 10

Leigh v. Green,
193 U.S. 79 (1904) 16

Marbury v. Madison,
5 U.S. 137 (1803) 15

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 4, 7, 8, 15

Morgan v. Regents of University of Cal.,
88 Cal.App.4th 52,
105 Cal.Rptr.2d 652 (2000) 9

Nazir v. United Airlines, Inc.,
178 Cal.App.4th 243,
100 Cal.Rptr.3d 296 (2009) 9

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 8, 10

Stationers Corp. v. Dun & Bradstreet, Inc.,
62 Cal.2d 412,
398 P.2d 785 (1965) 10

Swift & Co. v. Wickham
382 U.S. 111 (1965) 16

Tennessee v. Lane,
541 U.S. 509 (2004) 6

Texas Dept. of Comm. Affairs v. Burdine,
450 U.S. 248 (1981) 4, 7, 8, 15

Vasquez v. Hillary,
474 U.S. 254 (1986) 15

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV § 1 ..... 1, 2, 14, 15

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 1257(a) 3

28 U.S.C. § 2106 4

C.C.P. § 437c(b)(7)(c) 2

C.C.P. § 437c(b)(7)(e) 3

COURT RULES

Cal. Rules of Court 8.1115(a) 14

CALIFORNIA JURY INSTRUCTIONS

CACI 107 15

Petitioner William Driscoll ("Driscoll") respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of the State of California denying review and publication of the decision of the Court of Appeal, State of California. The Court of Appeal affirmed summary dismissal of Driscoll's discrimination and contract claims against CB Richard Ellis, Inc.("CBRE") and Driscoll's supervisors at CBRE, Mark Read ("Read") and Jeff Woolson ("Woolson").

DECISIONS BELOW

The decision of the California Supreme Court denying publication and review was filed on March 18, 2010, but is not reported. Appendix (App.) A-1. The Decision of the California Court of Appeal modifying but denying rehearing, and denying publication is at 2010 WL 199624. App. A-2. The Opinion of the California Court of Appeal affirming the trial court's summary judgment is reported as not to be published or cited at 2009 WL 4922520. App. A-4. The trial court's Judgment After Order Granting Summary Judgment was entered on March 25, 2008. App. A-46. The trial court's Written Ruling granting summary judgment in favor of CBRE, Read and Woolson was entered on January 22, 2008. App. A-48.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257, and the Due Process and Equal Protections Clauses of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California's summary judgment statute, at C.C.P. § 437c(b)(7)(c), provides:

> The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence.

which raise a triable issue as to any material fact.

The California's summary judgment statute, at C.C.P. § 437c(b)(7)(e), provides:

> If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

28 U.S.C. § 1257(a) Provides for certiorari from state court decisions:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the

treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2106, provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

This petition seeks review of an extraordinary series of decisions in California state courts in which the California Supreme Court allowed two lower courts to weigh disputed evidence at summary judgment. As authority for their flawed rulings, both lower courts unreasonably applied and incorrectly relied upon two of this Court's decisions: *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). App. A-62; App. A-16. Both decisions involved appeals after trial and discuss shifting burdens which have been applied at summary judgment; however, neither allow weighing disputed facts at summary judgment.

Driscoll is a highly decorated Vietnam combat veteran who is disabled. Driscoll's pleadings asked to tell the following story to a jury. App. A-83, App. A-111, and App. A-118.

- For most of 40 years he consistently performed at the highest level: at college, during war and peace as an officer in the United States Navy, and as a commissioned commercial real estate salesman employed by CBRE. App. A-83, App. A-111-118.
- He repeatedly encountered and overcame difficult circumstances and environments. App. A-84-102.
- In 2002, 30 years after his service in Viet Nam, Driscoll was diagnosed with combat-related PTSD. After the diagnosis, Driscoll's disability insurance company, Unum-Provident (Unum) advised CBRE that Driscoll suffered from a PTSD disability. App. A-91-92.
- After Unum advised CBRE of Driscoll's disability, Driscoll's conditions and treatment at CBRE changed substantially. The support and respect previously accorded him by his supervisors disappeared. By 2006, his working conditions were intolerable. App. A-94-110.
- CBRE's change in conduct was motivated by discriminatory purposes and was a breach of the express covenant which required CBRE and Driscoll to "use their skill, efforts, and abilities" so as to mutually benefit CBRE and Driscoll. App. A-41.

Driscoll's case presents this Court with a unique opportunity to examine a service-related mental disability in the context of discrimination. California incorrectly relied on this Court's decisions to deny Driscoll due process and equal protection. Without review, it is likely other productive disabled veterans returning from service will suffer similar mistreatment.

"The Due Process Clause . . . requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." *Tennessee v. Lane*, 541 U.S. 509, 523 (2004). California applied a harsh "more likely" standard to Driscoll's discrimination claims. In its modified opinion, the Court of Appeal admitted California does not apply a "more likely" standard to negligence claims at summary judgment. App. A-3-4.

A fair reading of California's summary judgment statute allows for no difference in treatment. The statute, as applied to Driscoll's disability claim, violates the Equal Protection Clause. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 439 (1985).

The trial court, *sua sponte,* without briefing or argument, and incorrectly relying on *Burdine, supra,* determined that Driscoll failed at summary judgment to establish that his offered evidence was "more likely" or more persuasive than CBRE's

account.[1] The Court of Appeal similarly misapplied *Burdine,* and compounded the constitutional error by incorrectly concluding that *McDonnell Douglas, supra,* also required the trial court to apply the "more likely" standard to Driscoll's response to CRBE's summary judgment motion.[2] Weighing evidence at summary judgment is contrary to a clear rule of law established by a long line of decisions of this Court and is an unreasonable reading and extension of *Burdine* and *McDonnell Douglas.*

---

[1] "Under Faust, the burden shifts to Plaintiff to persuade the court that 'a discriminatory reason more likely motivated the employer' or 'the employer's proffered explanation is unworthy of credence.' *Texas Department of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253-256." MINUTE ORDER. App. A-62.

[2] "Because direct evidence of discriminatory motive is ordinarily unavailable, California courts have adopted a 'three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment.' *(Id.* At p. 354, citing *McDonnell Douglas Corp. v. Green* (1971) 411 U.S. 792.)[4]" OPINION, App. A-16. "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." COURT OF APPEAL' OPINION, App. A-16, n.4.

REASONS FOR GRANTING THE PETITION

The state court summary judgment procedure, as applied to Driscoll, is constitutionally defective in three fundamental respects.

1. The Due Process and Equal Protection Clauses do not allow the weight of evidence to be determined at summary judgment.

The decisions of this Court do not support the lower courts' analysis. Neither *Burdine,* nor *McDonnell Douglas* discussed plaintiff's burden at summary judgment. While those cases discussed the shifting burdens, they certainly do not allow the trial court to weigh disputed evidence at summary judgment. Doing so is contrary to well-settled principles of constitutional law.

This Court's summary judgment decisions are to the contrary. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, (1986). At summary judgment, "'[c]redibility determinations . . . are jury functions . . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' *Ante,* at 2513." *Anderson, supra,* 477 U.S. at 269 (Rehnquist, J., dissenting). "[T]he [trial] court must draw all reasonable inferences in favor of the nonmoving, party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000).

2. The Due Process and Equal Protection Clauses require a meaningful hearing.

Due process and equal protection require California court's to apply California's summary judgment statute in a manner that provides Driscoll a meaningful hearing:

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

Without discussing California Civil Procedure, the California courts applied California's summary judgment code to Driscoll differently from precedent found in cited cases, which require courts to:

> '[A]ccept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them (citation omitted)' . . . 'in the light most favorable to [Driscoll] . . . and liberally construe [Driscoll's] . . . evidentiary submissions and strictly scrutinize [CBRE's] . . . own evidence, in order to resolve any evidentiary doubts or ambiguities in [Driscoll's] . . . favor.' (Citation omitted.)"

Nazir v. United Airlines, Inc., 178 Cal.App.4th 243, 254, 100 Cal.Rptr.3d 296 (2009). "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them." *Morgan v.*

Regents of University of Cal., 88 Cal.App.4th 52, 67, 105 Cal.Rptr.2d 652 (2000). At summary judgment "the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion." *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal.2d 412, 417, 398 P.2d 785 (1965).

3. Driscoll provided material disputed facts in response to CBRE's motion.

Third, the trial court accepted CBRE's paper story without allowing Driscoll to fully examine it before a jury as due process and equal protection require. Driscoll's description of material facts differs substantially from CBRE's version. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . ." *Anderson, supra,* 477 U.S. at 255. "'[W]e have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact. (Citations omitted)." *Reeves, supra,* 530 U.S. at 148. Accepting CBRE's unexamined tale is not permitted. This court has "frequently emphasized that the right to confront and cross examine witnesses is a fundamental aspect of procedural due process." *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969).

As an officer in the United States Navy, Driscoll flew more than 150 combat missions, in the back seat of an F-4 Phantom jet, repeatedly risking his life. App. A-84. In May 1972, after being shot down and rescued on his last combat mission into

North Viet Nam, Driscoll returned to San Diego, California as a celebrated Mig Ace. App. A-85-86. But he also returned suffering from the hidden and unresolved tensions and nightmares that many who similarly serve this nation in times of extreme peril experience. App. A-88.

After combat, Driscoll continued to serve this nation with spectacular success. His post-combat duties included service as a TopGun and Fleet Replacement instructor, providing instruction and guidance to young officers who chose to fly F-4 Phantoms and F-14 Tomcats for the United States Navy. App. A-85-86.

In 1981, Driscoll went to work for CBRE as a commercial real estate salesman in CBRE's Carlsbad, California office. From the beginning, Driscoll was highly successful. He made an excellent living and received exuberant praise and accolades from CBRE. App. A-86-87.

In 1982, Driscoll stopped drinking alcohol. He hoped this would end the decade-old nightmares and difficult dreams related to his combat experiences. App. A-88. Sobriety improved his mental health; however, it took him another 20 years to confront his inner demons and begin fully to understand the price of his military service. App. A-90-93.

In 2002, after twenty years of impressive success as a commercial real estate salesman with CBRE, Driscoll's nightmares became unmanageable. He had problems sleeping and concentrating. App. A-90. Many aspects of his previously successful life seemed to be unraveling. Despite his disability, Driscoll – with substantially more effort – was able to meet the needs of his employer and clients. App.

A-115-117; A-119-123. But top performance, which was the constant characteristic of Driscoll's efforts in everything he did, and which was a tremendous source of pride, became more difficult. App. A-90.

On the advice of a veteran with PTSD, Driscoll sought help from the Veterans Administration. He was surprised to learn that he was suffering from previously undiagnosed PTSD. App. A-91. He was deeply embarrassed by the diagnosis and feared the consequences of disclosure at work and in his community. App. A-92. Except for sharing the diagnosis with family and a few friends, he kept it private and went about the tasks necessary to return to full productivity in all aspects of his life.

As advised, Driscoll kept working. App. A-92-93. Acceptance, education, and lifestyle changes allowed Driscoll to become more efficient and return once again to economic productivity at CBRE. In 2002, prior to his diagnosis, therapy, and medications, Driscoll made only $16,209. App. A-90. In 2004, following regular therapy, including counseling and medications, Driscoll made $265,355. App. A-104.[3] Driscoll did what was necessary so that PTSD would not overwhelm him as it has so many other veterans. App. A-92. In 2004, Driscoll was CBRE's top producer in the Carlsbad office. App. A-137.

---

[3] Driscoll's 2004 income was almost exclusively from the Bressi Ranch project. Without the support of anyone in CBRE, Driscoll represented Sares Regis, the successful buyer of Bressi Ranch, and brought to CBRE the lucrative Sares Regis remarketing opportunity to assist Sares Regis in the commercial development of Bressi Ranch. App. A-99-104.

In November 2002, Read, in an unauthorized telephone call from Unum, was told by Unum that Driscoll had a disability policy with Unum, that he had "a severe case of battle fatigue and PTSD," and that he was 100% disabled as of June 2002. App. A-95, App. A-82.

Prior to 2003, Driscoll had never received any discipline, adverse performance evaluation, or change in job duties or responsibility. Prior to the call, no one in CBRE was critical of Driscoll's performance or work with any client or assignment. App. A-97. Even though Read advised Unum there had been no significant changes to Driscoll's duties, responsibilities, or performance over his 23 years of employment, Read and others in CBRE began the slow steady process of undermining Driscoll's relationship with clients. App. A-189; App. A-103-104; App. 111-117.[4]

After 2003, Read did not allow Driscoll to significantly participate in any assignments or projects. CBRE aggressively took work, projects and assignments, including Bressi Ranch, from Driscoll, which projects were brought to CBRE by Driscoll. App. A-107-109.

---

[4] Even though CBRE alleged continued support for Driscoll, the trial court and the Court of Appeal "found" to the contrary: "[T]he tentative ruling is unhelpful to Driscoll since the [trial] court properly found any attempt to divert business from him was not based on his disability." App. A-43.

At summary judgment, CBRE claimed that only Read knew of Driscoll's PTSD. CBRE claimed its change in treatment after Read learned of Driscoll's disability was because of Driscoll's lack of knowledge and experience, his decline in performance, and at the request of Sares Regis. App. A-124-135. However, at their depositions Read and Rooney, President of Sares Regis, testified to the contrary. App. A-147-149; A-162-187. Driscoll's clients, including Sares Regis, described Driscoll's performance, after Read learned of his PTSD, in the following terms: informative, enlightening, unbelievably thorough, extremely knowledgeable, diligent, conscientious, timely, wonderful, and appreciated. App. A-111, A-115, A-117; A-118, A-120-123; A-173-174, A-178.

The Court of Appeal found that Driscoll's evidence gave rise only "to a prima facie case of discrimination." App. A-5-6. California took Driscoll's story of employer misconduct and the law it applied to that misconduct, and filed it in a closet warning lawyers of the consequences should it be discussed any further in a California court.[5]

ARGUMENT AMPLIFYING REASONS

The trial court believed CBRE's version of the disputed facts and found it "more likely" than Driscoll's. However, the Due Process and Equal Protection Clause leave those determinations to the jury. At his deposition, Read admitted that

---

[5] "NOT TO BE PUBLISHED IN OFFICIAL REPORTS California Rules of Court, rule 8.1115(a), prohibits court and parties from citing or relying on opinions not certified for publication or ordered published . . ." App. A-4.

paragraph 8 of his declaration was incorrect, that he received no complaints from Sares Regis about Driscoll, and that he had no idea how many other statements in his declaration were incorrect. App. A-159-160; A-147-152. In California, a juror is instructed that they may disregard entire testimony if any important portion is willfully false. "However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said." CACI 107.

The Court of Appeal unreasonably interpreted *Burdine* and *McDonnell Douglas* to allow the trial court, at summary judgment, to determine credibility and weigh the disputed evidence. However, this Court has never developed such a rule of law and when it has accepted review of this issue, has consistently held to the contrary. This Court's decisions, the Due Process Clause, and the Equal Protection Clause, reject the notion of determining credibility at summary judgment.

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison,* 5 U.S. 137, 163 (1803). Principles such as due process and equal protection "are founded in the law rather than in the proclivities of individuals [including judges], and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillary,* 474 U.S. 254, 265–266 (1986). "In almost every setting where important decisions turn on questions

of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). "A fundamental requirement of due process is 'the opportunity to be heard' (citation omitted) . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Similarly situated plaintiffs must be treated the same. California's "more likely" standard, as applied to Driscoll, violated "the principal that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 537 (1991). Due process of law is satisfied only when a court has exercised its power "'as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes to which the one in question belongs,' it is due process of law. (Citation omitted.)" *Leigh v. Green*, 193 U.S. 79, 87–88 (1904).

Likelihood is not a standard capable of being applied consistently at summary judgment. Determining likelihood requires a fact-finding process. The standard cannot be applied at summary judgment or on appeal in a way that ensures consistent application before trial from one litigant to the next; therefore, it cannot equally protect all parties from arbitrary decisions. "[T]he mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co. v. Wickham* 382 U.S. 111, 116 (1965).

CONCLUSION

For the reasons stated, the court should grant the petition.

Respectfully Submitted,

DOUGLAS R. SHEPHERD
Counsel of Record
EDWARD S. ALEXANDER
Shepherd Abbott Alexander
1616 Cornwall Avenue, Suite 100
Bellingham, WA 98225
(360) 733-3773
dougshepherd@saalawoffice.com

June 15, 2010

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE – NO. D052929
S179708

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

WILLIAM DRISCOLL, Plaintiff and Appellant,
v.
CB RICHARD ELLIS, INC. et al., Defendants and Respondents.

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

George, C.J., was absent and did not participate.

[DATE STAMP]
SUPREME COURT
FILED
MAR 18 2010
Frederick K. Ohlrich Clerk
Deputy

CHIN_____
Acting Chief Justice

COURT OF APPEAL, FOURTH APPELLATE
DISTRICT, DIVISION ONE
STATE OF CALIFORNIA

[DATE STAMP]
FILED
COURT OF APPEAL FOURTH DISTRICT
JAN 21 2010
Stephen M. Kelly, Clerk
DEPUTY

WILLIAM DRISCOLL, Plaintiff and Appellant, v. CB RICHARD ELLIS, INC. et al., Defendants and Respondents.	D052929 (Sup. Ct. No.GIC874160) NO CHANGE IN JUDGMENT

THE COURT:

The opinion filed December 21, 2009, is modified as follows:

Discussion I, A, footnote 5, last three lines (slip opn., p. 15): after "motion," delete "as the evidence must be substantial to defeat the motion" and replace with "because in discrimination cases 'evidence of " 'pretense' must be 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate" on an improper basis. [Citations.]' "

Discussion I, A, footnote 5, last line (slip opn., p. 15): after "69" insert ", fn. omitted; but see also *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870,

880-881 [declining to apply 'more likely' standard in negligence action]"

At Discussion III, first sentence (slip opn. p.34): delete "Driscoll concedes that" and begin sentence with a capitalized "w" in "Workers'"

At Discussion III, middle of paragraph (slip opn., p.35): delete "He also concedes his" and replace with "The record discloses Driscoll's"

The petition for rehearing is denied.

There is no change in the judgment.

/s/ BENKE

BENKE, Acting P.J.

Filed 12/21/09 Driscoll v. CB Richard Ellis, Inc. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
STATE OF CALIFORNIA

WILLIAM DRISCOLL, Plaintiff and Appellant, v. CB RICHARD ELLIS, INC. et al., Defendants and Respondents.	D052929 (Sup. Ct. No.GIC874160) OPINION

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

In this disability discrimination case, plaintiff and appellant William Driscoll, a real estate sales person, appeals from a judgment entered on an order granting summary judgment in favor of his former employer, defendant and respondent CB Richard Ellis, Inc. (CBRE), and two of his former supervisors,

defendants and respondents Jeffrey Woolson and Mark Read. Driscoll contends he raised triable issues of fact as to whether defendants' stated business reasons for a group of adverse employment decisions were pretexts for disability discrimination.

Like the trial court, we find the defendants articulated a valid business reason for each employment decision Driscoll challenges and, further, that the record does not contain any facts which would support an inference the stated reasons were mere pretexts for discriminatory conduct. In particular, defendants presented evidence to the effect that Driscoll was not given responsibility for particular client accounts either because of circumstances outside the control of Driscoll's supervisors or because of the expressed preferences of a CBRE client. Defendants presented further evidence that Driscoll's supervisor took responsibility for managing potential government contracts from Driscoll because the supervisor determined a supervisor needed to manage that aspect of CBRE's business.

Contrary to his argument on appeal, in response to the evidence defendants presented in support of their motion for summary judgment, Driscoll did not present any evidence which, considered on its own or collectively, suggests the reasons offered by defendants were anything other than the bona fide reasons defendant made the challenged employment decisions. Rather, he relies in the main on the fact that the decisions were made after one of his supervisors and some of his coworkers learned that he suffered from post-traumatic stress disorder (PTSD). While that

chronology of events was sufficient to give rise to a prima facie case of discrimination, once defendants offered valid business reasons for their decisions, Driscoll was required to produce evidence which more directly undermined the credibility of the reasons offered by defendants. Driscoll failed to do so.

Because defendants presented unrebutted evidence of valid business reasons for the challenged employment decisions, they were entitled to summary judgment on Driscoll's discrimination claim. They were also entitled to summary judgment on his closely-related claims for constructive discharge, harassment and breach of contract. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *PTSD*

Driscoll flew for the Navy during the Vietnam war, and he is a highly decorated veteran. He left active duty in 1981. The same year, he obtained his real estate salesperson license and entered into a broker-salesman contract with a company that later merged with CBRE. He worked as a commissioned salesperson in CBRE's Carlsbad office.

Driscoll "had difficult nightmares and thoughts" regarding his combat missions. In the fall of 2001 he became more troubled and his work began to suffer. Driscoll's sales fell dramatically, and because the revenue he generated fell below a certain point, CBRE considered him a low performer and decreased his share of the commissions he earned for the company.

In February 2002 Driscoll received a formal diagnosis of PTSD. Driscoll was embarrassed about the diagnosis and decided not to reveal it to anyone at CBRE.

Notwithstanding his embarrassment, Driscoll applied for benefits available under a disability insurance policy. In November 2002 the insurer, UnumProvident Corporation (Unum), sent Mia Bagaybagayan, an office services manager at CBRE, a questionnaire asking for information on Driscoll's employment and compensation, and his written authorization for the release of the information. The materials Unum sent did not reveal the nature of his disability.

Read, CBRE's senior managing director in San Diego County, reviewed the Unum materials, and completed the questionnaire with the assistance of Bagaybagayan, and two members of CBRE's human resources department, Sue King and Donna Casey. Read then returned the completed questionnaire to Unum.

According to Read, he assumed Driscoll had some type of health problem, and he met with Driscoll to express sympathy and support. During the meeting, Driscoll volunteered he had PTSD. Read offered to give Driscoll up to six months' leave, but Driscoll refused the offer and said he intended to keep working. Driscoll asked Read to keep his disability confidential, and according to Read he respected Driscoll's wishes and never discussed the matter with anyone else at CBRE, other than Bagaybagayan, King and Casey.

Driscoll concedes that after meeting with Reed, he did not discuss his disability with anyone at CBRE.[1]

2. *Adverse Employment Decisions*

According to Driscoll, commencing in February 2003, CBRE made a series of five decisions about his responsibilities for various accounts which adversely impacted him and eventually led to what he characterizes as his constructive discharge. The five decisions are as follows:

A. *Titan Systems (Titan)*

Beginning in the spring of 2002, Driscoll had made an effort to solicit brokerage business from Titan, a defense contractor. To that end he had a number of meetings with a local Titan executive he knew, along with other Titan executives. According to Driscoll, in the spring of 2003, Read told him that he would get the Titan account at CBRE. Later, Driscoll learned from his contacts at Titan that the agent who had been handling the Titan account for another broker was leaving the employ of the broker and that CBRE had an opportunity to get the account. According to Driscoll, notwithstanding his contacts with Titan, and the promise he received from Reid, the Titan account was given to other CBRE agents.

---

[1] According to Driscoll, Read telephoned rather than met with him to discuss his disability, and during the call he did not tell Read he had PSTD. Driscoll agrees that Read said "he was sorry, and I could take as much time off as was necessary." Driscoll makes much of these conflicts, but they are not material to the issues on summary judgment.

B. *Bressi Ranch*

In the spring of 2003, Driscoll represented the purchaser of a 132-acre undeveloped parcel in Carlsbad. Following acquisition of the parcel known as Bressi Ranch, the purchaser planned to subdivide the land into a number of parcels and develop it as a business park. Because he had represented the purchaser in its acquisition of Bressi Ranch, Driscoll expected that when the property was subdivided he would act as one of the senior agents for the purchaser in its effort to resell the individual parcels. However, when CBRE was chosen to handle the resale, Driscoll was given only a very minor role in CBRE's resale team. Driscoll believed the purchaser was not anxious to have him participate in the resale effort because Read and Woolson had contacted the purchaser and discouraged the purchaser from using Driscoll.

C. *Morgan Stanley*

In September 2004 Driscoll spoke with the local representative of Morgan Stanley about the fact that its then-current lease for its Carlsbad office was due to expire. Driscoll had represented Morgan Stanley in the past and wanted to represent it in its negotiation for a new lease. The Morgan Stanley representative told Driscoll CBRE could have the listing if CBRE was willing to give Morgan Stanley a 50 percent discount on its usual commission.

When Driscoll attempted to get CBRE to agree to the discount, he faced unexpected hurdles. Read told him that, unbeknownst to Driscoll, all Morgan Stanley listings were being handled through a broker in CBRE's New York office. However, Driscoll later found out that the New York broker

did not want to handle the Carlsbad negotiation because it was too small. Driscoll believed that the information he received from Read was inaccurate and an attempt to redirect business away from him.

D. *Base Realignment and Closure (BRAG)*

In April 2005 Driscoll began an effort to obtain some of the business from the Navy which would be generated as a result of the then-ongoing Base Realignment and Closure (BRAC) proceedings. Driscoll traveled to Colorado for a three-day conference of BRAC contractors and to Washington, D.C. to make contact with members of the local congressional delegation and defense department officials.

CBRE officials in Washington who were coordinating the company's efforts to obtain the BRAC work prepared an organizational chart of the CBRE team that would work on the account if CBRE was successful in obtaining it. The chart indicated that rather than directly participating in the BRAC work for the government, Driscoll would act only in an advisory capacity.

E. *GSA Representative*

The General Services Administration (GSA) is a federal agency which procures outside contractors for the federal government. In 2005 Driscoll began a process by which he could become certified as CBRE's GSA representative. Initially, Read supported this effort. However, as Driscoll moved through the process, Read decided that Read would become the GSA certified representative for CBRE.

3. *Client Interference*

Although not alleged in the complaint, Driscoll also claimed defendants interfered with his relationship with two of his clients, Pat Jones and Dr. Dennis Carlo.

A. *Jones*

In 2003 Driscoll was meeting with a major golf course client, Pat Jones, at CBRE's offices. Woolson walked by, said hello to Jones and sat down and monopolized Jones in a lengthy conversation. According to Driscoll, Woolson took up all of Jones's available time.

B. *Carlo*

In October 2003 Driscoll invited Read and Woolson to have lunch with Dr. Dennis Carlo, a long-time client of Driscoll and the head a biotech company. According to Dr. Carlo, during most of the lunch Read and Woolson did not seem very interested in him or his potential needs. However, near the end of the lunch, Driscoll excused himself to use the bathroom. At that point Read and Woolson became very interested in Dr. Carlo's potential business and told him that there were other brokers at CBRE, including themselves, who had more experience and expertise than Driscoll. Dr. Carlo interpreted these comments as an effort to take business away from Driscoll. Dr. Carlo was shocked by what Read and Woolson said and afterwards told Driscoll about the incident.

Finally, Driscoll alleged defendants told him that he was one of the " 'retread' or 'reject' " brokers in CBRE's Carlsbad office."

4. *Litigation*

According to Driscoll after the PTSD diagnosis, "I did make substantial changes to my life, including education, medication, therapy and life style in a serious attempt to become fully productive at work, at home, and in the community" and in 2004 "I was back in the game.... In 2004, I was again the top producer in the Carlsbad office and made $526,710 in broker fees for CBRE, being paid one-half of those fees."

Nonetheless, in January 2006 Driscoll filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging discrimination based on mental disability. In late February or early March 2006, Driscoll resigned his position with CBRE.

In October 2006, after receiving a right to sue letter from DFEH, Driscoll sued: CBRE; Jeffrey Woolson, who was CBRE's managing director of its Carlsbad office, and Driscoll's immediate supervisor; Read, who was Woolson's supervisor; and William Chillingworth, who was CBRE's western regional manager and Read's supervisor. The complaint included causes of action against CBRE for disability discrimination in violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12940 et seq.), breach of contract and breach of the implied covenant of good faith and fair dealing, and constructive termination in violation of public policy; and against all defendants for harassment based on disability, and intentional and negligent infliction of emotional distress. In July 2007 Driscoll filed a first

amended complaint (hereafter complaint) that included the same causes of action.[2]

The complaint alleged that beginning in April 2003, about five months after Read learned of Driscoll's disability, and continuing to December 2005, CBRE discriminated against him with respect to the Titan Systems, Bressi Ranch, Morgan Stanley, BRAC and GSA accounts. According to Driscoll, defendants took those adverse employment actions against him because of his disability. Further, Read, Woolson and Chillingworth allegedly harassed Driscoll based on his disability, creating a hostile work environment and altered conditions of employment.

The tortious constructive discharge claim was also based on disability discrimination, and the claims for intentional and negligent infliction of emotional distress were based on disability harassment.

The breach of contract claim was based on a provision of the employment contract that stated the parties were to "use their skill, efforts, and abilities in cooperating to carry out the terms of this Agreement for the mutual benefit of Broker and Salesman." The complaint alleged that in violation of this clause "CBRE promoted a policy of investing only in what managers perceived to be the top 20% of producers. Managers were encouraged to specifically withhold investing time, resources and

---

[2] The complaint also included causes of action for negligent supervision, defamation and invasion of privacy, but Driscoll advises he does not contest summary judgment on those claims. The complaint also included Unum as a defendant, but it is not involved in this appeal.

capital into brokers which the managers considered to be 'low performers.' It was CBRE's belief that by ceasing to provide opportunities for growth to these 'low producers,' CBRE would ensure that they would eventually quit." The complaint also alleged CBRE breached the implied covenant by treating him disparately and constructively terminating his employment based on his disability.

In August 2007 defendants moved for summary judgment. They argued the discrimination and harassment claims were time-barred, Driscoll could not establish a prima facie case since the decision makers in most of the alleged incidents had no knowledge of his disability, and even if he could establish a prima facie case, defendants had a legitimate and nondiscriminatory basis for their conduct. Defendants argued the constructive discharge and emotional distress claims fail because they are based on the alleged discrimination and harassment. They argued the breach of contract and breach of the implied covenant claims fail because the contract did not entitle Driscoll to any particular assignment or commission.

In January 2007 the court granted the motion.[3] The court rejected the statute of limitations defense to the discrimination and harassment claims, finding triable issues of fact as to whether the alleged conduct was a continuing violation. The court also found Driscoll established a prima facie case of discrimination and harassment based on

---

[3] Driscoll dismissed Chillingworth from the complaint before the hearing.

disability. The court, however, determined defendants' evidence established legitimate, non-discriminatory reasons for their actions, and Driscoll did not produce evidence implying a discriminatory motive. Absent discrimination or harassment, the court found no ground for claims for constructive discharge, negligent supervision or emotional distress. To the extent emotional distress claims were not based on discrimination or harassment, the court found they were subject to the workers' compensation exclusivity rule. Further, the court found no triable issues on the breach of contract and breach of the implied covenant claims, as the contract did not specify Driscoll's entitlement to any particular work assignments. Judgment was entered for defendants on March 28, 2008.

DISCUSSION

I

Disability Discrimination and Harassment

A. *Burdens of Proof on FEHA Claims*

The FEHA prohibits an employer from terminating or otherwise discriminating against any employee on enumerated grounds, including physical or mental disability. (Gov. Code, § 12940, subd. (a).) The FEHA also prohibits an employer from harassing an employee on the ground of disability. (Gov. Code, § 12940, subd. (j)(1).) Driscoll's discrimination and harassment claims are based on the same alleged conduct.

"Disparate treatment," the form of discrimination at issue here, "is *intentional* discrimination against one or more persons on prohibited grounds." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 (*Guz v. Bechtel*).) Because direct evidence of discriminatory motive is ordinarily unavailable, California courts have adopted a "three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination. . . based on a theory of disparate treatment." (*Id.* at p. 354, citing *McDonnell Douglas Corp. v. Green* (1971) 411 U.S. 792.)[4] Under the *McDonnell Douglas* test, (1) the plaintiff/employee must set forth sufficient evidence to establish a prima facie case of discrimination, (2)

---

[4] "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (Guz v. Bechtel, supra, 24 Cal.4th at p. 354.)

the defendant/employer must then articulate a legitimate, nondiscriminatory reason for the adverse employment action, and (3) the employee then has the opportunity to show the employer's articulated reason is pretextual. (*Guz v. Bechtel, supra,* 24 Cal.4th at p. 355.)

Plaintiff's prima facie burden is minimal, and the specific elements may vary depending on the particular facts. Generally, plaintiff must show "(1) he was a member of a protected class, (2) he was qualified for the position...sought or was performing competently in the position. . . held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel, supra,* 24 Cal.4th at p. 355.) To make out a prima facie case of harassment, plaintiff must show he or she was subject to, for instance, derogatory comments "sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. [Citation.]' " (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1045.)

Notwithstanding the *McDonnell Douglas* test, "like all other defendants, the employer who seeks to resolve the matter by summary judgment must bear the initial burden of showing the action has no merit." (*Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1058; *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156.) A defendant satisfies this burden by showing one or more of plaintiff's prima facie elements is lacking, that the adverse employment action was based on legitimate, nondiscriminatory factors, or that there is a complete defense to the cause of

action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203, citing *Texas Dept of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255, fn. 8 [101 S.Ct. 1089].) " 'Once the defendant. . . has met that burden, the burden shifts to the plaintiff...to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*Aguilar*, supra, 25 Cal.4th at p. 849.) The burden-shifting rules apply equally to claims of harassment under the FEHA. (*Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 948-949 [retaliation]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614 [harassment].)

When, as here, plaintiff's case relies exclusively on circumstantial evidence of pretext, the evidence " 'must be "specific" and "substantial" ... to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.)

In contrast, where there is direct evidence of a discriminatory or retaliatory intent " "a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." [Citation.]

The plaintiff is required to produce "very little" direct evidence of the employer's discriminatory intent to move past summary judgment.' " (*Ibid.*)[5]

We review a summary judgment ruling de novo, applying the same standards as the trial court. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 997, 999.) " 'We accept as

---

[5] Driscoll complains the court erroneously relied on the "more likely" standard set forth in *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031. In *Cucuzza*, the court explained that "even though we may expect a plaintiff to rely on inferences rather than direct evidence to create a factual dispute on the question of motive, a material triable controversy is not established unless the inference is reasonable. And an inference is reasonable if, and only if, it implies the unlawful motive is more likely than defendant's proferred explanation." (*Id.* at p. 1038.) In support, *Cuzcuzza* cites *Aguilar, supra*, 25 Cal.4th at p. 857. (*Cuzcuzza, supra*, at p. 1038 [erroneously citing p. 858 of *Aguilar*].) Driscoll argues the *Cuzcuzza* court's reliance on *Aguilar* was improper because in Aguilar the court approved the "*more likely*" standard in the context of an antitrust action for an unlawful conspiracy. (*Aguilar, supra*, at p. 857.) Courts, however, routinely use the "more likely" standard in the context of a summary judgment motion in a FEHA action. (See, e.g., *Morgan v. Regents of University of California, supra*, 88 Cal.App.4th at p. 68; *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 553; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 140; *King v. United Parcel Services, Inc.* (2007) 152 Cal.App.4th 426, 433; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 112; *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1220.) The "more likely" standard is appropriate when the plaintiff relies exclusively on circumstantial evidence in opposition to a summary judgment motion, as the evidence must be substantial to defeat the motion. (*Morgan v. Regents of University of California, supra*, 88 Cal.App.4th at p. 69.)

true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citations.]' " (*Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 67.)

B. *Specific Claims*

Driscoll does not dispute that defendants met their burden of producing competent evidence their conduct was based on legitimate, nondiscriminatory reasons, and the reasons are legally sufficient to show his claims lack merit. He contends summary judgment was improper because he met his burden of producing evidence supporting a rational inference the stated reasons are pretextual, and the true cause of defendants' conduct was disability discrimination and harassment. As we explain below, we conclude that with respect to each employment decision he failed to meet his burden.

1. *Titan*

With respect to the Titan account, CBRE submitted the declaration of Mark Sprague, who formerly worked for a Los Angeles commercial real estate company, Insignia/ESG, Inc. (Insignia), which had Titan as a client. Sprague was on the brokerage team at Insignia that managed the Titan account, "which involved selecting brokers to perform acquisition and disposition assignments on behalf of Titan in various cities nationwide." In 2003 CBRE acquired Insignia, and the Titan account and Sprague moved to CBRE. Insignia's team leader on the Titan account left before the merger, and Sprague stepped into his shoes. The declaration explains that "Because no one was dislodged from the Titan account team, there has been no reason for

me to add any permanent CBRE brokers to the account team post-merger." The declaration states that Sprague, in consultation with Titan, selected brokers to represent Titan, and Read, Woolson and Chillingworth never participated in the decisions. Further, Sprague neither met Driscoll nor was aware of his disability until he filed suit.

Driscoll produced no evidence refuting Sprague's declaration. Driscoll submitted his own declaration, which states: "Read assured me that if CBRE got any Titan work, that I would be involved at all levels in CBRE with Titan assignments in the San Diego area," and he later asked Read to be considered for the position of Titan's team manager, but Sprague got the position. Driscoll also cited Sprague's deposition testimony that he was "pretty sure" Read never talked to him about Driscoll's interest in being the broker on the Titan account. Sprague testified he did not ask Read for input on who may be the best broker for Titan and Read never recommended anyone.

Driscoll asserts his evidence shows "the decision to exclude Driscoll was not made by Sprague, but by Read." Driscoll also cites the rule: "When there is a discrepancy between a deposition and a declaration submitted in connection with an opposition to a motion for summary judgment, the deposition controls." (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1328, fn. 3.) Sprague's deposition testimony, however, does not suggest Read made the decision pertaining to the Titan account. Rather, he merely remained silent on the matter as it was within Sprague's control. Sprague's declaration and deposition testimony are

entirely consistent. Driscoll produced no evidence permitting a jury to reasonably find pretext. "[T]he great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz v. Bechtel, supra*, 24 Cal.4th at p. 361, fn. omitted.) "[S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Id.* at p. 362, relying on *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 US. 133, 148-149 [120 S.Ct. 2097].)

2. *Bressi Ranch*

With respect to the Bressi Ranch matter, defendants submitted a declaration from Peter Rooney, a manager of the developer, Sares-Regis. Rooney's declaration states that in September 2003 he told Rick Sparks, a salesperson with CBRE,[6] that Sares-Regis was concerned about using CBRE for the remarketing, and it was particularly concerned about Driscoll. The declaration explains that although Driscoll performed well on the property

---

[6] Sparks and another CBRE sales person, Matt Strockis, represented the company that sold the Bressi Ranch property to Sares-Regis.

acquisition, he "failed to provide adequate and appropriate information about the Carlsbad market during the Bressi Ranch escrow period;" "we wanted a broker with significant experience in leasing and selling comparable properties," and Driscoll "lacked this qualification"; and "Driscoll's business primarily consisted of tenant representation throughout the United States [and] we needed brokers expert in representing landlords and business park owners in North San Diego County." In Rooney's view, CBRE's proposed remarketing team "lacked the kind of 'superstar' type broker with strong local market knowledge." Accordingly, Rooney advised CBRE he believed CBRE and Driscoll were not the most qualified to remarket Bressi Ranch, and he intended to invite other brokerage firms to compete for the business.

In an effort to get the account, CBRE recruited former CBRE broker Lannie Allee back to the company because of his extensive experience in selling land in Carlsbad. Rooney's declaration states CBRE made a listing presentation, and "I was very impressed with the new team [it] had assembled. In particular, I was impressed with the extensive experience of new broker [Allee] in selling...business parks, located in the Carlsbad market," and "I was also favorably impressed by Roger Carlson and his background with multiple sale and lease transactions in San Diego County." After the presentation, Rooney consulted with Hagestad, and they concluded CBRE would get the remarketing account "because of the addition of [Allee] and [Carlson] to the listing team. [However,] [b]ased on our concerns with [Driscoll], we asked CBRE that he

not be included on the re-marketing team." Rooney's declaration also states: "CBRE did not decide that [Driscoll] should be removed from the Bressi Ranch re-marketing efforts—that was my decision, along with John Hagestad."

Further, the Rooney declaration states that when Driscoll learned of the decision, he contacted the developer and asked to participate in some way. Rooney and John Hagestad, another manager, decided that "as a measure of our firm's good will, [the developer] would allow [Driscoll] to hold a minor role on the CBRE team."

Additionally, the Rooney declaration states that until Driscoll filed his lawsuit, "I was unaware of any medical condition or disability of [Driscoll], and no one at CBRE ever told me anything about such medical condition or disability." Further, "at no time did a representative of CBRE suggest to me that [Driscoll] should not be involved" in the Bressi Ranch remarketing.

Hagestad testified in deposition that after the developer initially refused to use Driscoll, "I felt a moral obligation to help [him] out. ...I probably felt there wouldn't be a contribution to the team, but I felt a moral obligation to help [him] because he had been very helpful to us in the acquisition of the property." Hagestad told CBRE that he and Rooney "were prepared to give [Driscoll] a minor position on the team," meaning "Not lead," "Not significant," and "Not important."

Driscoll contends he produced "strong evidence that the 'Bressi Ranch' decision *was* made by CBRE." He argues that the developer instructed CBRE to "leave him off the remarketing team when

Driscoll's supervisors told them Driscoll was not a 'team player,' "(italics added) and "Rooney explained in his deposition that Sares-Regis excluded Driscoll from the remarketing team *because CBRE told them Driscoll was a 'not a team player.'* " (Italics added.)

Driscoll, however, has not provided us with a citation to Rooney's deposition testimony.[7] Driscoll does cite Hagestad's deposition testimony. He was asked, "Did you ever hear from anybody in CBRE that [Driscoll] was not a team player?" He responded: "I think—Rick Sparks and I probably had that discussion at one point in time. That, again, based on [Driscoll's] history at [CBRE] that he worked on his own. That he was a bit of a loner. He did not work as part of a team." Hagestad clarified, however, that *he* probably told *Sparks* that he [Hagestad] believed Driscoll was not a team player. Hagestad explained: "Because...his course of conduct over the sum eight or 10 years that I had kind of seen and heard about his involvement. This was what he...told us that he had been out on his own. He had been working on transactions by himself. He was not part of a team in the Carlsbad office. He was an individual broker. He was a person who did things on his own."

---

[7] "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (5th ed. 1997) Appeal, § 701, p. 769.) Accordingly, where a party provides a brief without "record references establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

Hagestad also testified he did not recall that Sparks or anyone else at CBRE made any derogatory or negative comments about Driscoll. Hagestad said his discussions with Sparks "were not negative" and CBRE was "concerned about getting a listing."

In their respondents' brief, defendants point out that Driscoll's evidence does not show CBRE told the developer he was not a team player. In his reply brief, however, Driscoll maintains this claim. He asserts that after he learned the developer did not want him on the remarketing team, he met with Hagestad and Rooney and they told him "they had originally assumed [he] would be on the Bressi Ranch remarketing team..., but instructed CBRE to leave him off the remarketing team because CBRE told them Driscoll was not a 'team player.' " His citations to the record however do not support this contention.

Driscoll cites his deposition testimony that Woolson told him he would probably not be on the developer's remarketing team because "I wasn't a team player. I didn't have experience and I wasn't the kind of person *the client* wanted to deal with." (Italics added.) That does not indicate that Woolson or anyone else at CBRE referred to Driscoll as not a team player. Indeed, he cites a statement in his declaration that "Woolson told me that [the developer] did not believe that I was a team player and I was not the type of person they wanted representing them."

Additionally, Driscoll again cites Hagestad's deposition testimony that he probably had a conversation with Sparks about the team player issue. As discussed, however, Hagestad clarified that

he probably told Sparks he [Hagestad] believed Driscoll was not a team player. Contrary to Driscoll's assertion, Hagestad's deposition testimony is not unclear on who characterized Driscoll as not a team player. The team player issue does not raise any triable issue pertaining to pretext or animus based on disability.

Driscoll also contends be raised triable issues of fact as to the real reason CBRE excluded him from the remarketing team *after* Rooney and Hagestad agreed he could have a minor role. Driscoll cited Rooney's deposition testimony that he signed a listing agreement for CBRE that included Driscoll as part of the developer's "core marketing team." Further, Driscoll cited Rooney's and Hagestad's deposition testimony that after initially rejecting Driscoll's involvement altogether, they told Sparks he could play a minor role on the marketing team, and they had no conversations with CBRE pertaining to his exact role. Driscoll also relied on the statements in his declaration that Rooney and Hagestad told him his exact role "was being left up to CBRE," and "I did ask [them] for and did expect to have a substantial role," and "I also expected to participate in the remarketing commissions paid to CBRE at a rate no less than any other member of the team, other than [Allee], the team leader."

Driscoll's declaration also states that a marketing brochure CBRE prepared and disseminated did not include Driscoll's name, and CBRE gave him no role in the remarketing activities. The declaration also states, however, that CBRE did give him a role—"to bring any work on Bressi Ranch to...Sparks"—but he was dissatisfied

with it. Driscoll testified in deposition that although Allee and Sparks refused to give him a greater role, Sparks nonetheless agreed to share his commissions with Driscoll, which "would have brought [his] commission deal relative to remarketing efforts to approximately 6.25 percent." When Driscoll was asked whether he accepted the decision not to give him an "enhanced or more visible role" in the remarketing, Driscoll said "Yes."

Again, Driscoll's evidence does not permit a finding of pretext or animus based on disability. CBRE had a client who lacked confidence in him, did not want him on the remarketing team, and only agreed out of a sense of obligation to allow him a minor role. It appears that CBRE did allow Driscoll a minor role, but it did not meet his expectations. In any event, even if CBRE ultimately cut him out of the account altogether, the decision was reasonable given the developer's expectation that he would play an unimportant role and not make any real contribution to the remarketing effort. When the developer voiced its displeasure with Driscoll and insisted on drastically restricting his involvement, CBRE was not required to nonetheless place him on the remarketing team. In other words, although it was ultimately CBRE's decision, given its client's expressed misgivings about Driscoll, no inference of discriminatory animus arises as a result of that decision.

3. *Morgan Stanley*

With respect to Morgan Stanley, defendants submitted the declaration of Read and Chillingworth, in which they explained that all of Morgan Stanley's business was being handled by a

New York broker, and that Driscoll would have to get the approval of the New York broker in order to handle the listing himself. With respect to the requested commission reduction, which was ultimately denied by Chilllingworth, they explained that because Morgan Stanley had given its national business to a competitor, they were unwilling to give Morgan Stanley a discount which might negatively impact CBRE's ability to get full commissions from Morgan Stanley in other markets. Defendants also pointed out that Driscoll went back to the Morgan Stanley representative and offered to reduce his own portion of the commission. Morgan Stanley declined his offer and instead agreed to pay CBRE a full commission, and in the end Driscoll earned a gross commission of $122,000 from Morgan Stanley.

There is nothing in the record which suggests Read was in error in telling Driscoll that before taking the listing he would need to get the approval of the New York broker before taking the local Morgan Stanley listing. Moreover, there is nothing in the record which suggests that Chillingworth's ultimate decision to deny Morgan Stanley a discount was anything other than a hardnosed business decision unrelated to Driscoll's PTSD. Thus there are no facts related to the Morgan Stanley transaction from which a discriminatory motive can be inferred.

4. *BRAC*

In response to Driscoll's BRAC contentions, defendants relied on Driscoll's concession that CBRE did not win any contract for BRAC work. Defendants also relied on a declaration from Read which stated: "CBRE's Washington, D.C. office's broker team

eventually chose the members of the BRAC team, identifying [Driscoll] in an advisory title rather than the leadership role be wanted. This interim designation proved inconsequential: CBRE lost out on the contract to Booz Allen, leaving no BRAC team for [Driscoll] to lead."

In response, Driscoll cited his declaration in support of his assertion "CBRE did not support [him] in his effort to get the BRAC work in the first place." As the trial court noted in its ruling, however, the BRAC issue "is of little consequence because CBRE never received the BRAC work." Because CBRE did not get the BRAC work, there was no adverse employment decision or consequence and no actionable discrimination or harassment. An adverse employment action exists "where an employer's action negatively affects its employee's compensation." (*Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 847.)

5. *GSA Certification*

With respect to the GSA Certification, defendants submitted a declaration from Woolson, which stated: "The GSA is an arm of the federal government that procures outside contractors. In 2005, [Driscoll] expressed interest in becoming certified to serve as CBRE's [GSA] representative, the point of contact whom the GSA will regularly contact regarding possible federal government outside contract work. [Driscoll] took steps toward becoming the GSA certified representative for CBRE, enlisting the help of James McCarthy, CBRE's marketing officer. At CBRE's expense, [McCarthy] helped [Driscoll] to commence the certification process, and the two gathered

additional information regarding GSA certification by attending a seminar on the topic.

"As I learned more about the role and duties of the GSA representative, I decided that it would be in the best interest of CBRE if I assumed the role of GSA representative because of my position as Managing Director. By attaching the GSA representative designation to the level of Managing Director, rather than an individual broker, CBRE would essentially be institutionalizing this role. In other words, with a Managing Director as the permanent figurehead, CBRE would establish a consistent business relationship with the government, independent of any one person. Equally important, with a Managing Director as the primary contact, I could assure the GSA that there would be no conflict of interest because I, personally, would have no financial gain in landing a particular contract. In contrast, there is a potential for a conflict of interest if a broker, who is a salesperson, were the primary contract because he or she could divert many or all of the GSA assignments to himself or herself."

Driscoll cited certain paragraphs from his own declaration, but they merely recounted that he tried to get the GSA certification and in his opinion he was more qualified for it, but Woolson ultimately stepped in. Driscoll's declaration does not dispute Woolson's declaration, or raise any question as to pretext. Even if Driscoll's superior qualifications are debatable on the merits, the issue has little or no relevance in determining whether Woolson's stated reason was a mask for disability discrimination. If not discriminatory, an employer's "true reasons need

not necessarily have been wise or correct." (*Guz v. Bechtel, supra*, 24 Cal.4th at p. 358.)

6. *Jones, Carlo and Retread*

With respect to the Jones incident, Woolson submitted a declaration in which he stated that he sat down with Jones, who he had known for a number of years, because Jones appeared interested in talking to him about listings Woolson had. With respect to the Carlo lunch, Read and Woolson submitted declarations denying any attempt to divert Carlo's business.

Like the trial court, we find that even if the record fully supports Driscoll's contention that Woolson and Read acted against his interests in both the Jones and Carlo incidents, and that the reference to retread and rejects was improper, there is nothing in the record which would support an inference this conduct was borne out of any animus related to Driscoll's PTSD as opposed to a simple improper level of competition with one of their subordinates. As we noted in *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005: "'The [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. [Citations.]....'"

In short then, summary judgment was proper on the discrimination and harassment causes of action, as defendants produced evidence of legitimate, nondisciminatory reasons for their conduct, and Driscoll produced no evidence from which a reasonably jury could infer discrimination or harassment. Given this holding, we are not required

to address defendants' contention that Driscoll cannot establish a prima facie case of discrimination or harassment because some defendants lacked knowledge of his disability, defendants' conduct did not constitute adverse employment actions, and most claims are time-barred.

B. *Cumulative Evidence*

Driscoll also contends that even if the specific events do not suggest discrimination or harassment individually, they do so considered as a whole and along with evidence of additional discriminatory conduct he presented. He cites *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740 (*Johnson*), which states: "Although we have set out several matters which *by themselves* will not constitute substantial evidence that defendant's stated reason for firing plaintiff was pretextual or that defendant acted with a discriminatory animus when it fired her, there remains the question whether these matters, *when taken together*, do constitute sufficient evidence to demonstrate a triable issue of fact with respect to plaintiffs contention that her pregnancy was the true cause of defendant's decision to fire her." (*Id.* at p. 758.) In *Johnson* the plaintiff was fired the same day she returned from a short sick leave related to her pregnancy, the employer gave her no reason for its action, and a supervisory employee admitted she had concerns about having pregnant employees at work. Under those circumstances, the appellate court found there were triable issues as to whether the employer's stated reason that plaintiff falsified her time records was pretextual. (*Ibid.*)

Here, in contrast, Driscoll did not claim any adverse action shortly after Read learned of his condition in November 2003. Rather, the first incident of discrimination the complaint alleged began in April 2003.[8] Further, it appears CBRE provided Driscoll with business explanations for most, if not all, its decisions, such as the developer's lack of confidence in him for the remarketing effort at Bressi Ranch, CBRE's failure to obtain the BRAC work, and Woolson's decision to be the GSA certification representative himself. Further, there is no evidence any CBRE employee voiced any concern about having a salesperson with PTSD on the job.

Thus, in considering the evidence cumulatively, we conclude there is no triable issue of material fact.

C. *Accommodation*

Additionally, Driscoll contends there are triable issues of fact pertaining to whether defendants accommodated his disability. Under section 12940, subdivision (m), it is illegal for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." "In addition to a general

---

[8] "[T]emporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination [or other adverse action]." (Arteaga v. Brink's, Inc. (2008) 163 Cal.App.4th 327, 353.) "Where the employee relies solely on temporal proximity in response to the employer's evidence of a nonretaliatory reason for termination, he or she does not create a triable issue as to pretext, and summary judgment for the employer is proper." (Id at p. 357.)

prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer's failure to provide a reasonable accommodation for an applicant's or employee's known disability." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54.) The complaint here alleged defendants failed to accommodate Driscoll's disability.

"Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith." (*Gelfo v. Lockheed Martin Corp., supra,* 140 Cal.App.4th at p. 54; *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252.) The employee is not required to invoke the FEHA, mention the term "accommodation" or request a specific accommodation to trigger the interactive process. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.) The employee, however, "'can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. [Citations.] An employer also has no duty to accommodate an employee who denies she [or he] has a disability or denies a need for accommodation.'" (*Ibid.*)

It is undisputed that when Read learned of Driscoll's disability in November 2002 he immediately offered to accommodate him by giving him up to six months off. Driscoll, however, denied any need for accommodation. Driscoll's declaration states that he told Read "I did not need any time off and that I intended to continue working." Further, he admitted in deposition that he never requested any other type of accommodation.

Driscoll asserts that in opposition to the summary judgment motion he "specifically averred that in 2003, he had repeatedly asked CBRE for accommodations to alleviate the effects of his disorder." In support, he cites his declaration, at page 1099 of the appellant's appendix, which states: "In 2003, I asked for accommodations from CBRE. I complained on several occasions to my immediate supervisor [Woolson] that I did not have a secretary assigned to work directly with me and that I had recently again gone through a number of temporary secretaries who had trouble doing my work without a lot of errors. [Woolson] appeared to listen; however, additional or more qualified staff was not provided to me." There is no evidence Woolson even knew about Driscoll's disability. Driscoll did not want anyone at CBRE to know about it, and he stated in a declaration that he told no one at CBRE about his disability, including Read. An employee cannot both keep his disability a secret from his employer and request accommodation for the disability. Even if knowledge is somehow imputed to Woolson, however, this statement does not show any request for an accommodation to "alleviate the

effects of [Driscoll's] disorder." Rather, Driscoll merely requested a competent full-time secretary.

Driscoll also asserts he "asked Woolson several times to assign secretarial and staff support to accommodate Driscoll's need to organize tasks and manage his time." In support, Driscoll cites his declaration at pages "1093, 1109, 1107, 1108-9" of the appellant's index. He does not, however, refer to any specific paragraphs, and thus we are left to guess what he may believe supports his position.

Page 1093 states that *before* Driscoll's PTSD diagnosis: "Many of the staff assigned to me in the CBRE Carlsbad office were temporary help, not qualified to do the work assigned." Page 1107 states: "I put substantial efforts into convincing my superiors to provide me the necessary support to attempt to obtain both BRAC and GSA work." Pages 1108-1109 state: "In 2003, I complained bitterly to Michelle Candland, assistant regional manager for CBRE, about my disparate treatment regarding the Titan account/assignment. In particular, I complained about [Read's] failure to honor his promise to me regarding participating on the Titan account. I expected her to intervene on my behalf. She did nothing." Page 1109 also states that between 2003 and 2005 Driscoll complained to Read and Woolson "about my treatment regarding my role in the Bressi Ranch remarketing team," and in late 2004, "I complained over and over again to [Read] regarding my failure to get any support from CBRE for the Morgan Stanley assignment in Carlsbad." None of these statements shows Driscoll requested any accommodation for PTSD or to help him "organize tasks and manage his time."

Driscoll also cites Read's deposition testimony that he did not believe he had ever been responsible for implementing an accommodation for a disabled employee. That does not mean, however, that his offer to let Driscoll take several months off work was not an offer of accommodation. Summary judgment was proper on the accommodation claim.

II

Constructive Discharge

"Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245.)

The complaint's constructive discharge cause of action is also based on unlawful disability discrimination and harassment. The court correctly determined that because there are no triable issues of fact as to discrimination or harassment, summary judgment is also proper on the constructive discharge claim.

Driscoll raises the "retread and reject brokers" comments in arguing there are triable issues of fact as to the viability of his constructive discharge claim. Driscoll's declaration states that in the fall of 2003, Woolson "complained to me that the CBRE Carlsbad office was full of retread and reject brokers.... This

was a statement made by [Woolson], directly to me again in 2004." "[T]o amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient to support a constructive discharge claim." (*Turner v. Anheuser-Busch, Inc., supra*, 7 Cal.4th at p. 1247.) Woolson's comments do not indicate he was referring to Driscoll's disability. Driscoll merely speculates that was the case, and "speculation cannot be regarded as substantial responsive evidence." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.) As a matter of law, Woolson's comments did not create intolerable working conditions.

Driscoll also cites the statement in his declaration that he "witnessed acts of discrimination between senior managers and female staff." He cites *Cruz v. Coach Stores, Inc.* (2d Cir. 2000) 202 F.3d 560, 570, for the general rule that a plaintiff claiming hostile work environment may introduce evidence of the employer's harassment of others. "Because the crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility...for those incidents to support her claim. [Citation.] Nor must offensive remarks or behavior be directed at individuals who are members of the plaintiffs own protected class. Remarks targeting members of other minorities, for example, may contribute to the overall hostility of the working

environment for a minority employee." Driscoll's declaration, however, is merely conclusory. It states no specific facts pertaining to CBRE's treatment of others, and thus raises no triable issue of material fact.[9]

III

Emotional Distress

Driscoll concedes that workers' compensation is the exclusive remedy for any emotional distress claims unrelated to discrimination and harassment. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 756 [workers' compensation "provides the exclusive remedy for torts that comprise 'a normal part of the employment relationship' "]) He also concedes his claims for negligent and intentional infliction of emotional distress are based on disability discrimination and harassment. Accordingly, summary judgment was also proper on these claims.

IV

Breach of Contract/Breach of Implied Covenant

A single cause of action alleged breach of contract and breach of the implied covenant of good faith and fair dealing. For the breach of contract claim, the complaint cited the provision in Driscoll's

---

[9] Given our holding, we are not required to address CBRE's assertion that Driscoll failed to exhaust administrative remedies on his constructive discharge claim.

employment agreement that "Broker and Salesman agree to all the foregoing terms and conditions and to use their skill, efforts, and abilities in cooperating to carry out the *terms of this Agreement* for the mutual benefit of Broker and Salesman." (Italics added.)

CBRE established the above provision was the only contract provision at issue, and it does not confer rights on Driscoll to any right to particular work assignments. The court's ruling notes that "because the contract does not reference particular work assignments Defendants' alleged conduct of refusing Plaintiff certain assignments, is insufficient to establish breach of contract. Absent evidence of breach, there are no triable issues of material fact...."

Driscoll contends the court failed to consider the language of the above contract provision. As the record shows, however, in fact the court expressly addressed the provision.

Driscoll cites *National Data Payment Systems v. Meridian Bank* (3d Cir. 2000) 212 F.3d 849, 854, for the proposition that the "duty of best efforts 'has diligence as its essence' and is 'more exacting' than the usual contractual duty of good faith." In that case, the parties to a purchase agreement agreed to use their "best efforts" to close the deal by a certain date. (*Id.* at pp. 851-852.) One party sued the other for failing to use best efforts to consummate the transaction. (*Id.* at p. 853.) The court affirmed summary judgment on the claim as there was evidence the transaction would not have closed on the designated date even if the defendant employed best efforts. (*Id.* at p. 854.) Here, the contract required the parties to use their skill and efforts in

carrying out the terms of the contract. Driscoll produced no evidence of any failure of CBRE to use its skill and efforts in relation to any particular contract obligation. In particular, Driscoll produced no evidence that any statements made to Jones or Carlo deprived him of any commissions. Accordingly, there is no question of fact requiring trial on the breach of contract claim.

Driscoll asserts that even if there was no breach of contract as a matter of law, his claim for breach of the implied covenant of good faith and fair dealing is viable. Driscoll cites the court's tentative ruling, which states in its discussion of the discrimination and harassment claims that "Construing all the evidence in favor of Plaintiff, *at best, these events reflect Defendants' attempts to divert Plaintiff's business to themselves.* There is no evidence to suggest Defendants' [*sic*] were motivated by Plaintiffs disability." (Italics added.) Driscoll asserts that since the tentative ruling indicates defendants sought to steal his business, triable issues of material fact preclude summary judgment on the breach of implied covenant claim.

Admittedly, "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract. [Citation.] This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (*Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417.) However, "A summary

judgment motion is directed to the issues framed by the pleadings." (*Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1073.) The breach of implied covenant cause of action alleged CBRE breached the implied covenant "by disparately treating [Driscoll] and by constructively terminating [his] employment because of his disability." Because the breach of implied covenant cause of action is based solely on discrimination and harassment, the tentative ruling is unhelpful to Driscoll since the court properly found any attempt to divert business from him was not based on his disability. The complaint does not allege that *apart* from the alleged discrimination and harassment, CBRE breached the implied covenant.

V

Memorandum Exceeding 20 Pages

The court denied Driscoll's application to file a memorandum of points and authorities exceeding 20 pages because the application violated a rule of court that requires applications to be filed at least 24 hours before the memorandum is due. (Cal. Rules of Court, rule 3.1113(e).) Because of the denial, the court deemed defendants' motion for summary judgment unopposed as to certain causes of action discussed in pages 21 through 25 of the memorandum. Driscoll asserts the court abused its discretion by denying the application since this is a complicated matter that required 25 pages.

Driscoll ignores, however, the court's statement in its ruling: "Even if the court were to consider pages 21-25 of Plaintiff's opposing points

and authorities, the result would not change." The ruling went on to consider and discuss Driscoll's showing on the causes of action discussed in pages 21 through 25 of his memorandum. Accordingly, any arguable abuse of discretion caused no prejudice.

VI

Read's Second Deposition Transcript

Read's second deposition session was held on September 19, 2007. Driscoll filed his original opposition to the summary judgment motion on October 5, 2007. In support of his original opposition, Driscoll submitted excepts from the transcript of Read's first and second deposition sessions. One of his attorneys, Douglas Shepherd, submitted a declaration on October 5 that states he took Read's first deposition on September 18, 2007, and his second deposition on September 19, 2007. The declaration sets forth portions of Read's testimony from both deposition sessions.

In an October 18, 2007 order, the court continued the summary judgment motion because Driscoll's separate statement violated Code of Civil Procedure section 437c and a rule of court by not correctly citing supporting evidence. For instance, it cited to paragraphs of declarations, but not to page and line numbers. The court allowed Driscoll to correct the deficiencies in his separate statement and file a new memorandum of points and authorities referring to the evidence cited in his separate statement.

Driscoll's revised opposition papers differed significantly from his original opposition. His separate statement went from 50 to 130 pages, he cited different and additional evidence, and lodged nine additional exhibits. Defendants objected to the additional evidence and the court excluded it.

On appeal Driscoll argues the court abused its discretion by excluding "two newly-acquired exhibits" he submitted when he filed his amended separate statement, including in particular Read's second deposition. We find no abuse of discretion. The record does not show that the exhibits were unavailable at the time the initial opposition was filed and Driscoll has not shown how the excluded exhibits were material to the opposition.

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

/s/ BENKE
BENKE, ACTING P.J.

WE CONCUR:

/s/ HALLER, J.

/s/ O'ROURKE, J.

[DATE STAMP]
FILED
CLERK OF THE SUPERIOR COURT
MAR 25 2008
BY: K. Mulligan, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

WILLIAM DRISCOLL, an individual, Plaintiff, vs. CB RICHARD ELLIS, INC., a Delaware Corporation; MARK READ, an individual, JEFF WOOLSON, an individual, and WILLIAM CHILLINGWORTH; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, et al, Defendants.	Case No. GIC874160 JUDGMENT AFTER ORDER GRANTING SUMMARY JUDGMENT

This action came on for hearing on the Motion for Summary Judgment filed by Defendants CB Richard Ellis, Mark Read, Jeff Woolson, and William Chillingsworth on January 4, 2008, in Department

62 of the San Diego County Superior Court, the Hon. Ronald L. Styn, Judge presiding. Plaintiff William Driscoll appeared by attorney Richard M. Wirtz and Corrie Klekowski of Wirtz Hellenkamp LLP and Douglas Shepherd of Shephard Abbott Carter. Defendants appeared by attorneys Mary C. Dollarhide and Stephanie Anobil of Paul Hastings Janofsky & Walker LLP and Karen Greenberg of CB Richard Ellis, Inc.

On January 22, 2008, the Court issued its written ruling on said motion granting summary judgment in favor of Defendants CB Richard Ellis, Mark Reed, and Jeff Woolson, and against plaintiff.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said plaintiff shall take or have and recover nothing from Defendants CB Richard Ellis, Mark Reed and Jeff Woolson.

[hand written insert]

** Defendants CB Richard Ellis, Mark Read and Jeff Woolson to recover costs of $8,165.72.*

([illegible], 3/25/08)

Dated: MAR 25 2008 */s/ Ronald L. Styn*

Judge of the Superior Court

[STAMP: RONALD L. STYN]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO CENTRAL

MINUTE ORDER

[DATE STAMP]
RECEIVED
JAN 24 2008
CTC: _____

Date: 01/22/2008 Time: 02:00:00 PM Dept: C-62

Judicial Officer Presiding: Judge Ronald L. Styn
Clerk: Kim Mulligan
Bailiff/Court Attendant:
ERM:
Reporter. , Not Reported

Case Init. Date: 10/17/2006

Case No: GIC874160

Case Title: DRISCOLL vs CB RICHARD ELLIS INC

Case Category: Civil - Unlimited

Case Type: Wrongful Termination

Event Type: Summary Judgment / Summary Adjudication (Civil)

Moving Party: CB RICHARD ELLIS INC, MARK READ, JEFF WOOLSON, WILLIAM CHILLINGWORTH

Causal Document & Date Filed: Motion for Summary Judgment and/or Adjudication, 08/03/2007

Appearances:

The Court, having taken the above-entitled matter under submission on 01/04/2008 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The court first addresses the evidentiary issues.

Defendants CB Richard Ellis, Inc., Mark Read, Jeff Woolson and William Chillingworth's motion to strike Plaintiff's evidentiary exhibits attached to second notice of lodgment and motion to strike Plaintiff's new evidence in revised separate statement of facts are granted. The court's October 19, 2007, order does not allow for submission of new evidence. The court has not considered any new evidence in issuing its ruling on this motion.

The court declines to issue specific rulings on the objections raised in Defendants' Amended Motion to "Strike Plaintiff's Evidentiary Exhibits Attached to Notice of Lodgment, Amended Evidentiary Objections and Motion to Strike Declarations of William Driscoll, Barbara Kiley, and Dennis J. Carlo and Amended Evidentiary Objections and Motion to Strike the Five Declarations of Douglas R. Shepherd. All told, the motion and evidentiary objections comprise 225 pages of un-numbered objections.

Given the "nature and volume" of the objections, the court declines to rule on each one. *Tilley v. CZ Master Association* (2005) 131 Cal.App.4th 464, 479.

Plaintiff's application for permission to file a memorandum of points and authorities exceeding twenty pages is denied. Plaintiff fails to comply with California Rules of Court, rule 3.1113(e) ["A party may apply to the court ex parte but with written notice of the application to the other parties, *at least 24 hours before the memorandum is due*, for permission to file a longer memorandum...."]. Plaintiff's application was not filed prior to filing of Plaintiff's memorandum. Plaintiff had two opportunities to timely file this application (with the original points and authorities and with the revised points and authorities) and failed to timely file.

The court then rules as follows.

Defendants' CB Richard Ellis, Inc., Mark Read, Jeff Woolson and William Chillingworth's motion for summary judgment is granted.

First Cause of Action - Discrimination (FEHA)
Second Cause of Action - Disability Harassment
Fourth Cause of Action - Wrongful Constructive Termination in Violation of Public Policy

Failure to Exhaust Administrative Remedies

"Incidents of discrimination not included in an EEOC charge may not be considered by a federal

court unless the new claims are "'like or reasonably related to the allegations contained in the EEOC charge.'" *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984) (quoting *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th. Cir. 1973)), cert. denied, 469 U.S. 1108, 105 S. Ct. 784. 83 L. Ed. 2d 778 (1985); accord *Stache v. International Union of Bricklayers and Allied Craftsmen,* 852 F.2d 1231, 1234 (9th Cir. 1988). In determining whether an allegation under Title VII is like or reasonably related to allegations contained in a previous EEOC charge, the court inquires whether the original EEOC investigation would have encompassed the additional charges. *See Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators,* 525 F.2d 1354, 1359 n. 3 (9th Cir. 1975) ("it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination") (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)); *see also Brown*, 732 F.2d at 730 ("where claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated"). *Stache*, 852 F.2d at 1234 (relying on Brown). Finally, "the remedial purpose of Title VII and the paucity of legal training among those whom it is designed to protect require charges filed before the EEOC to be construed liberally." *Stache*, 852 F.2d at 1233; see also *Kaplan*, 525 F.2d at 1359."

Green v. Los Angeles County Superintendent of Schools (1989) 883 F.2d 1472, 1476; *Okoli v. Lockheed Technical Operations Company* (1995) 36 Cal.App.4th 1607, 1615.

Plaintiff filed a complaint with the DFEH on January 3, 2006. The complaint identifies discrimination based on "mental disability." Under "particulars" the following were checked: "demoted" "denied promotion" "denied accommodation" "other (specify) reduced job responsibilities and opps." The complaint identifies the "date most recent or continuing discrimination took place" as "12/30/05." [Plaintiff's Opposing SSUMF 4] The DFEH issued a "right-to-sue" letter on January 4, 2006. [Exhibit 5] Plaintiff left his employment with Defendant CBRE on either February 28, 2006 or March 1, 2006. [SSUMF 17; Plaintiff's Opposing SSUMF 17] Plaintiff's court complaint was filed on October 17, 2006. Plaintiff filed an "amended" complaint with the DFEH on October 20, 2006. [Plaintiff's Opposing SSUMF 1] The amended complaint is identical to the original complaint except it includes in the particulars "forced to quit" and uses the word "opportunities" in place of "opps." [Plaintiff's Opposing SSUMF 1] There is no evidence a "right-to-sue" letter was issued following the amended complaint.

Constructive Termination

Based on the evidence before the court, the only claims authorized for litigation via the "right-to-sue"

letter are those contained in the original (January 3, 2006) DFEH complaint. Therefore there is no evidence Plaintiff exhausted his administrative remedies as to the "forced to quit" particular identified in the "amended" complaint. The "forced to quit" particular is the basis for Plaintiff's constructive termination claim.

Plaintiff fails to provide authority allowing the "forced to quit" particular in the "amended" complaint to relate back to the original complaint. The DFEH makes no administrative determination as to the retroactivity of amended complaints. See, DFEH "Enforcement Division Directive Number 208" ["when an amendment to a closed case is accepted, the Department makes no administrative determination on the retroactivity of the amended complaint and the amendment has no effect on the originally issued right-to-sue letter by the Department. The original right-to-sue remains in effect, as does the original statute of limitations for filing a private lawsuit."] The court is not persuaded by Plaintiff's argument the "forced to quit" allegation, which is the basis for Plaintiff's constructive termination claim, is "like or reasonably related" to the other charges such that the original investigation would have encompassed the additional charge of "forced to quit." See, *Green v. Los Angeles County Superintendent of Schools* (1989) 883 F.2d 1472, 1476. At the time the original DFEH complaint was filed, Plaintiff was still employed by Defendant CBRE. Thus, it would have been impossible for the investigation of Plaintiff's

other claims ("demoted" "denied promotion" "denied accommodation" "other (specify) reduced job responsibilities and opps.") to have "encompassed" the charge of "forced to quit"/constructive termination. Plaintiff falls to establish he exhausted his administrative remedies with respect to his constructive termination claim.

At oral argument, Plaintiff argued his constructive termination cause of action is a common law constructive termination claim which is not barred by failure to exhaust administrative remedies. Under *Stevenson v. Superior Court* (1997) 16 Cal.4th 880 and *Rojo v. Kliger* (1990) 52 Cal.3d 65, "the exhaustion rule does not apply to common law causes of action for wrongful discharge in contravention of public policy." *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 1242. In *Walrath* the court found because plaintiff pled a common law cause of action for "wrongful discharge in violation of the public policy in FEHA," plaintiff's wrongful discharge claim was not barred by failure to exhaust administrative remedies. Similarly, the court finds Plaintiff's complaint alleges facts to support a common law cause of action for wrongful discharge in violation of public policy. The reference to Government Code §12940 (part of FEHA) in ¶130 of the complaint does not require a finding Plaintiff's wrongful discharge claim is a statutory claim. Rather, similar to the *Walrath* plaintiff's reference to FEHA in his common law tort claim for wrongful discharge, the complaint's reference to FEHA is to demonstrate disability discrimination is against

public policy – one of the requirements of a common law wrongful discharge cause of action. For these reasons, the court finds Plaintiff's common law constructive termination cause of action is not barred by failure to exhaust administrative remedies.

Harassment

Neither the original complaint nor the amended DFEH complaint identifies "harassed" as a particular. [Plaintiff's Opposing SSUMF 4, 1] However, unlike the "forced to quit"/constructive termination allegations, the court finds the harassment allegations would have been uncovered in the scope of the investigation of the allegations of "demoted" "denied promotion" "denied accommodation" "other (specify) reduced job responsibilities and opps." Plaintiff's harassment claim is based on the same conduct as is alleged to support Plaintiff's disability discrimination claim. [FAC ¶¶13-66] As such, the DFEH investigation would have encompassed the additional charge of harassment. Therefore, the court finds Plaintiff's has exhausted his administrative remedies with respect to the harassment cause of action.

Statute of Limitations

Discrimination
Harassment

Plaintiff filed his original DFEH complaint on

January 1, 2006. Therefore, only those acts occurring after January 3, 2005, are timely. Government Code §12960. However, as to those acts occurring prior to January 3, 2005, Plaintiff relies on the continuing violation theory to avoid the bar of the statute of limitations.

"To establish a continuing violation [a plaintiff has] to show 'a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period.'" *Valentino v United States Postal Serv.*, 218 U.S. App. D.C. 213, 674 F.2d 56, 65 (D.C.Cir. 1982) (quoting B. Schei & P. Grossman, *Employment Discrimination Law* 232 (Supp. 1979)); see also *Bruno v. Western Elec. Co.*, 829 F.2d 957, 961 (10th Cir. 1987) (quoting Valentino). A continuing violation may thus be established not only by demonstrating a company wide policy or practice, but also by demonstrating a series of related acts against a single individual. *Id.* at 961. In the latter instance, "[the] question ... boils down to whether sufficient evidence supports a determination that the 'alleged discriminatory acts are related closely enough to constitute a continuing violation.'" *Id.* (quoting Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983)).

Green v. Los Angeles County Superintendent of Schools (1989) 883 F.2d at 1480-1481.

Plaintiff alleges discrimination related to the BRAC project during the time period April-July 2005 [FAC

¶¶ 51-59] and related to the GSA Certification during the time period June-December 2005 [FAC ¶¶60-66]. The conduct alleged to support the BRAC discrimination claims is based on CBRE's alleged refusal to appoint Plaintiff to a position on the BRAC team. The conduct alleged to support the GSA Certification discrimination is based on CBRE's alleged refusal to allow Plaintiff to be certified as the CBRE Western United States GSA Representative. The conduct alleged to support these discrimination claims falls within the statute of limitations.

Plaintiff also alleges discrimination based on Defendants' conduct with respect to "Titan Systems," "Bressi Ranch," "Morgan Stanley," comments made re "reject and retread" brokers, a "commission split" issue, comments made to Dr. Carlo, and discussions during a meeting with Pat Jones. As alleged, and as shown by evidence, the conduct supporting each of these bases for discrimination occurred prior to January 3, 2005 [SSUMF 3, 4, 5, 6, 7, 8]. However, Plaintiff submits evidence the "Bressi Ranch" discrimination continued through January 2005 when Defendants prevented Plaintiff from appointment to the Bressi Ranch re-marketing team [Plaintiff's Opposing SSUMF 3]. Plaintiff also submits evidence CBRE continued to keep Plaintiff off of the Titan account through March 2006 when Plaintiff left CBRE [Plaintiff's Opposing SSUMF 4]. The conduct alleged to support the "Titan Systems" discrimination is based on Defendants refusal to appoint Plaintiff as the account representative for Titan Systems. The conduct alleged to support the

"Bressi Ranch" discrimination is based on Defendants refusal to allow Plaintiff to be part of the re-marketing team for Bressi Ranch.

The conduct alleged regarding "Titan Systems" and "Bressi Ranch" is similar to Defendants alleged conduct with respect to the BRAC project and the GSA Certification – denying Plaintiff the opportunity to be a part of the team handling these projects. This conduct is similar to the conduct alleged with respect to ""Morgan Stanley," comments made re "reject and retread" brokers, a "commission split" issue, comments made to Dr. Carlo, and discussions during a meeting with Pat Jones – all involving denying Plaintiff business opportunities. Therefore, although scant, the court finds Plaintiff submits sufficient evidence to create a triable issue of material fact as to whether the "Titan Systems" and "Bressi Ranch" discrimination/harassment occurring after January 3, 2005, and the BRAC project and GSA Certification discrimination the "are related closely enough" to the discrimination/harassment occurring prior to January 3, 2005, so as to constitute a continuing violation.

At oral argument Defendants' argued the evidence contained in Plaintiff's Opposing SSUMF 3 and 4 is exclusively new evidence stricken by the court's evidentiary rulings. The court has re-reviewed Plaintiff's original separate statement and revised separate statement with respect to SSUMF 3 and 4. As to SSUMF 3, Plaintiff's original separate statement and revised separate statement contain

identical text after the word Disputed: "beginning with Mr. Driscoll's involvement .... re-marketing material for Bressi Ranch." Immediately thereafter, the original separate statement refers to "Driscoll Declaration ¶¶ 51, 56-63; 67; Ex. 2 (1/7/07 Listing Broker Agreement; Ex. 3 (01/01 Listing Agreement"). The revised separate statement refers to "Driscoll Declaration; 17:2-3, 8-13 18:17-19:2; 20:4-13; Read Ts. 287:6-12; Ex. 2 (1/7/07 Listing Broker Agreement; Ex. 3 (Advertising Brochure for Bressi Ranch). The page and line citations to portions of the Driscoll Declaration referred to in the revised separate statement are contained within the paragraphs referred to in the original separate statement and are not new evidence. Ex. 2 is the same in both separate statements. Plaintiff changed Exhibit 3 from the Listing Agreement to the Advertising Brochure for Bressi Ranch. The advertising brochure is new evidence and has been stricken. The Read transcript is new evidence and has been stricken. The remainder of the contents of Plaintiffs Opposing SSUMF 3 is also new and has been stricken. However, the portions of the Driscoll Declaration support Plaintiffs Opposing SSUMF 3. The court conducted a similar analysis with respect to Plaintiff's Opposing SSUMF 4. The non-stricken portions of Plaintiffs Opposing SSUMF 4 support Plaintiff's Opposing SSUMF 4.

Merits

Discrimination
Harassment

To establish a prima facie case for disability discrimination plaintiff must show:
"(1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability. [Citations.] On a motion for summary judgment brought against such a cause of action the plaintiff bears the burden of establishing a prima facie case of discrimination based upon physical disability, and the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer has done so the plaintiff must offer evidence that the employer's stated reason is either false or pretextual, or evidence that the employer acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally discriminated. [Citation.]" (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44 [90 Cal. Rptr. 2d 15].)

Faust v. California Portland Cement Company (2007) 150 Cal.App.4th 864, 886.

The elements of a disability harassment claim are Plaintiff 1) suffers from a disability, 2) was subjected to unwelcome conduct, 3) the conduct was based on his disability, and 4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. See *Fisher v. San Pedro Peninsular Hospital* (1989) 214 Cal.App.3d 590, 608 (using the elements of a claim for sexual harassment

hostile work environment.)

"The showing the plaintiff must make as to the elements of the prima facie case in order to defeat a motion for summary judgment is *de minimis*." *Sutera v. Schering Corporation* (2nd Cir. 1995) 73 F.3d 13, 16, citing *Cronin v. Aetna Life Insurance Company* (2nd Cir. 1995) 46 F.3d 196, 204.

As to his discrimination claim, Plaintiff offers evidence he suffers from a disability – PTSD [Plaintiff's ADMF 16]; he is otherwise qualified to do his job – he was the "top producer" in 2004 (Plaintiff's ADMF 30, 35, 49) and he was subject to adverse employment action because of his disability – after Defendants' became aware of Plaintiff's PTSD diagnosis, Plaintiff was subjected to loss of business opportunities/assignments and eventually "forced to quit" [Plaintiff's ADMF 11, 12, 28, 29, 33, 35-48, 50-60; Plaintiff's Opposing SSUMF 17]. As to his harassment claim, Plaintiff offers evidence he suffers from a disability – PTSD [Plaintiff's ADMF 16], he was subjected to unwelcome conduct – loss of business opportunities/assignments, being referred to as a "retread" and "reject" broker and eventually being "forced to quit" [Plaintiff's ADMF 33, 34-48, 50-61, 63], the conduct was based on Plaintiff's disability – Defendants unwelcome conduct occurred after Defendants became aware of Plaintiff's PTSD diagnosis [Plaintiff's ADMF 11, 12, 28, 29, 33, 34-48, 50-61, 63] and the harassment was sufficiently pervasive so as to alter the conditions of employment and create an abuse working environment – Plaintiff

no longer received support from Defendants, Plaintiff was denied opportunities/assignments and was "forced to quit" [Plaintiff's ADMF 28, 29, 33, 34-48, 50-61, 63]. The court finds this evidence sufficient to establish a prima facie case of discrimination and harassment. It was not until after Defendants became aware of Plaintiff's PTSD diagnosis that Plaintiff was denied business opportunities/assignments.

Defendants set forth evidence to establish legitimate non-discriminatory reasons for their actions – Plaintiff's performance, staffing decisions made by clients and decisions made pursuant to CBRE corporate policy [SSUMF 20-27].

Under Faust, the burden shifts to Plaintiff to persuade the court that "a discriminatory reason more likely motivated the employer" or "the employer's proffered explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253-256.

Bressi Ranch

Defendants offer evidence, through the declarations of Peter Rooney (President of the Commercial Investment Division of Sares-Regis) and John S. Hagestad (Managing Director of Sares-Regis), that Sares-Regis specifically asked CBRE to not include Plaintiff on the re-marketing team, it was not Defendants but Sares-Regis' decision to remove Plaintiff from the re-marketing efforts, later

Sares-Regis decided to allow Plaintiff to hold a minor role on the re-marketing team, and at no time did Defendants suggest to Sares-Regis that Plaintiff should not be involved in the re-marketing effort [SSUMF 21]. In opposition Plaintiff relies on Rooney and Hagestad's deposition testimony (Plaintiff's Opposing SSUMF 17]. However, the relied upon testimony does not contradict the unequivocal declarations of Rooney and Hagestad that the decisions with respect to Plaintiff's role on the Bressi Ranch re-marketing were made by Sares-Regis.

Titan Systems

Defendants offer evidence, through the declaration of Mark A. Sprague (Vice-President of CBRE) that Sprague was part of the team servicing the Titan account prior to the account moving to CBRE, that Sprague took over as team leader when the account moved, and because Sprague's team stayed in place when the Titan account moved to CBRE, there was no need to add any other CBRE brokers to the team [SSUMF 22]. In opposition, Plaintiff offers evidence that Defendant Read assured Plaintiff if CBRE got any Titan work, Plaintiff would be involved at all levels, and that when the position of team leader opened up on the Titan team, Read recommended two other sales persons for the position and Sprague was "chosen" for the position (Plaintiff's Opposing SSUMF 22].

Morgan Stanley

Defendants offer evidence Plaintiff's Morgan Stanley account did not provide significant work to CBRE, Morgan Stanley's national work was handled by another firm that provided a reduced fee arrangement to Morgan Stanley, the decision made with respect to Plaintiff's proposed reduced fee arrangement for Morgan Stanley was made in New York by the President of CBRE's Tri-State Region and was based on CBRE's corporate policy of not allowing this type of a discount to a non-national account [SSUMF 23]. In opposition, Plaintiff presents evidence of an unexplained delay in obtaining an answer regarding approval of the reduced fee [Plaintiff's Opposing SSUMF 23], Defendant Read told Plaintiff not to do anything on the Morgan Stanley assignment without Read's approval [Plaintiff's ADMF 51], Plaintiff took the Morgan Stanley assignment without Read's permission [Plaintiff's ADMF 53] and Plaintiff received no more business from Morgan Stanley [Plaintiff's Opposing SSUMF 23].

Commission-Split

Defendants offer evidence Plaintiff and another CBRE employee agreed to a 2% (instead of 4%) tenant representation fee related to leasing new office space, after closing, Plaintiff sought 4%, and, after considering Plaintiff's request, CBRE (via Jeff Woolson and Mark Read) stuck with the original 2% [SSUMF 24]. In opposition, Plaintiff offers evidence

Woolson became very angry when Plaintiff requested 4% and that this anger illustrates Woolson's "discriminatory distain" for Plaintiff (Plaintiff's Opposing SSUMF 24].

Pat Jones Meeting

Defendants offer evidence that Woolson had known Pat Jones for 10 years prior to seeing Pat Jones in a meeting with Plaintiff, Woolson saw Jones meeting with Plaintiff, and, because it appeared Jones was interested in buying more resorts, Woolson sat down and chatted with Jones about Woolson's resort listings, and Woolson was trying to cross-sell and not disrupt Plaintiff's meeting with Jones [SSUMF 25]. In opposition, Plaintiff submits his own declaration that it was not proper for Woolson to "monopolize" Jones' time at the expense of Plaintiff's use of Jones time [Plaintiff's Opposing SSUMF 25]

GSA

Defendants offer evidence the decision to have Woolson, the Managing Director of CBRE, as the GSA representative was made to "institutionalize" the role so as to establish a consistent business relationship with the government independent of any one person and to prevent the potential for conflicts of interest [SSUMF 26]. Plaintiff offers his own declaration that Plaintiff did all the work to get the designation and there was no business reason to vest Woolson with the designation [Plaintiff's Opposing SSUMF 26].

BRAC

Defendants offer evidence, because CBRE failed to get the BRAC work, there was no BRAC work for Plaintiff [SSUMF 27]. Plaintiff offers evidence Defendants did not support his efforts to get the BRAC work [Plaintiff's Opposing SSUMF 27] and that when the initial BRAC organizational chart was published, Plaintiff was relegated to a minor role, when he had been promised he would take a leadership role in any BRAC work [Plaintiff's ADMF 58].

"Reject/Retread" Brokers

Plaintiff also offers evidence on two occasions Woolson commented that the Carlsbad office (where Plaintiff was located) was full of "reject or retread brokers" [Plaintiff's Additional Facts 34].

Dr. Carlo

Plaintiff offers evidence that Defendants Read and Woolson tried to divert Plaintiff's client, Dr. Carlo, to other CBRE brokers [Plaintiff's Additional Facts 48].

The court finds Plaintiff's evidence fails to establish "a discriminatory reason more likely motivated" Defendants. As stated by the court in *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031

If the employer has met its burden by showing a legitimate reason for its conduct, the employee must

demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action. (*Guz, supra*, 24 Cal.4th at p. 357; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004 [67 Cal. Rptr. 2d 483] (Hersant).) "[S]peculation cannot be regarded as substantial responsive evidence." (*Martin, supra*, 29 Cal. App. 4th at p. 1735.) In order to raise an issue as to the employer's credibility, the employee must set forth specific facts demonstrating "'such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence."'" (*Hersant, supra*, 57 Cal. App. 4th at p. 1005.)

In discrimination cases, proof of the employer's reasons for an adverse action often depends on inferences rather than on direct evidence. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." Evid. Code, § 600, subd. (b). (2)) Thus, even though we may expect a plaintiff to rely on inferences rather than direct evidence to create a factual dispute on the question of motive, a material triable controversy is not established unless the inference is reasonable. And an inference is reasonable if, and

only if, it implies the unlawful motive is more likely than defendant's proffered explanation. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858 [107 Cal. Rptr. 2d 841, 24 P.3d 493].)

Cucuzza, 104 Cal.App.4th at 1038.

The court finds the evidence presented does not imply a discriminatory motive is more likely than Defendants' proffered explanation for each of the allegedly discriminatory acts. The "Bressi Ranch" decision was not made by CBRE. The Titan Systems team was in place prior to the account moving to CBRE. The Morgan Stanley decision was based on corporate policy. The commission split was agreed to by Plaintiff. The GSA decision was based on a business decision and conflict of interest issue. The BRAC issue is of little consequence because CBRE never received the BRAC work. None of these events imply a discriminatory motive is more likely than Defendants' proffered explanation. Similarly, there is no evidence the "reject and retread" comments or the events of the Pat Jones meeting and Dr. Carlo meeting were motivated by a discriminatory motive or that a discriminatory motive is more likely than Defendants' proffered explanation. For these reasons, the court finds Plaintiff fails to meet his burden under Cucuzza.

Fourth Cause of Action – Wrongful Constructive Discharge in Violation of Public Policy

"[C]onstructive discharge occurs when the working

conditions deteriorate, as a result of discrimination, to the point that they become "sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 930, citing *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246 and *Watson v. Nationwide Insurance Co.* (9th Cir. 1987) 823 F.2d 360, 361. For the reasons set forth above, Plaintiff fails to establish discrimination and/or harassment. Absent a finding of discrimination and/or harassment, there is no basis for Plaintiff's constructive termination claim.

Third Cause of Action – Breach of Contract (Breach of Covenant of Good Faith and Fair Dealing)

Defendants submit evidence CBRE did not get the BRAC work [SSUMF 31]. Therefore, there can be no breach of Defendant Read's alleged promise to give Plaintiff a leadership role on BRAC work. Plaintiff offers no evidence or argument to support a breach of contract based on the alleged agreement regarding BRAC work.

To the extent Plaintiff relies on the "Broker-Salesman" agreement, Plaintiff fails to submit evidence of a breach of this agreement by Defendants. Defendants submit evidence the terms of the "Broker-Salesman" agreement require the parties to "use their skill, efforts, and abilities in cooperating to carry out the terms of this Agreement

for the mutual benefit of Broker and Salesman" [SSUMF 32] and the Agreement does not include any reference to particular work assignments or specific commission splits for in house work for CBRE [SSUMF 33]. Defendants also submit evidence Plaintiff failed to perform under the terms of this Agreement. [SSUMF 34] Plaintiff submits evidence of satisfactory job performance. [Plaintiff's Opposing SSUMF 34]. However, even assuming Plaintiff fulfilled his "performance" related obligations, because the contract does not reference particular work assignments Defendants' alleged conduct of refusing Plaintiff certain assignments, is insufficient to establish breach of contract. Absent evidence of breach, there are no triable issues of material fact as to whether Defendants breached a contract or breached the covenant of good faith and fair dealing.

Fifth Cause of Action Defamation
Ninth Cause of Action Invasion of Privacy
Sixth Cause of Action – Intentional Infliction of Emotional Distress
Seventh Cause of Action – Negligent Infliction of Emotional Distress
Eighth Cause of Action – Negligent Supervision
Claim for Punitive Damages

In light of the court's ruling denying Plaintiff's application for leave to file a brief in excess of the 20 page limit, the remainder of Defendants' motion, including the motion as to each of these causes of action and claim for damages, is unopposed. The

court finds there are no triable issues of material fact as to each of these causes of action and Plaintiff's claim for punitive damages.

Even if the court were to consider pages 21-25 of Plaintiff's opposing points and authorities, the result would not change.

Fifth Cause of Action Defamation
Ninth Cause of Action Invasion of Privacy

Statute of Limitations

"Section 458 has been strictly construed as requiring that the relevant statute and subdivision, if applicable, be pleaded, otherwise the answer fails to raise the statute of limitations defense." *Coy v. County of L.A.* (1991) 235 Cal. App. 3d 1077, 1087 fn. 5 citing *Davenport v. Stratton* (1944) 24 Cal.2d 232, 246-247. Defendants' answer fails to identify the code section and/or subsection relied upon. Accordingly, Defendants are barred from raising the statute of limitations as a defense.

Merits

Defendants submit evidence demonstrating Defendants did not make any false statement of fact about Plaintiff to any third party and did not disclose a private fact about Plaintiff to another. [SSUMF 42] The evidence Plaintiff submits fails to establish Defendants made a false statement of fact about Plaintiff, or that Defendants disclosed a

private fact about Plaintiff to another. See, *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645; *Taus v. Loftus* (2007) 40 Cal.4th 683, 720 (elements of a cause of action for defamation) and *Taus*, 40 Cal.4th at 717; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1440 (elements of a cause of action for invasion of privacy. Absent such evidence, there are no triable issues of material fact as to Plaintiff's defamation and invasion of privacy claims.

Sixth Cause of Action – Intentional Infliction of Emotional Distress
Seventh Cause, of Action – Negligent Infliction of Emotional Distress

In light of the exclusivity of worker's compensation, and absent claims for discrimination and harassment, Plaintiff's emotional distress causes of action fail. As stated by the court in *Jones v. Department of Corrections* (2007) 62 Cal.Rptr.3d 200 (under similar facts),

> Because we conclude Jones did not establish discrimination her causes of action for emotional distress fail to the extent they are tethered to the discrimination claim. Further, independent basis for disposing of these causes of action for emotional distress is that they are barred by the exclusivity rule of workers' compensation. Even if the

> discriminatory conduct Jones complained about "may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25 [276 Cal. Rptr. 303, 801 P.2d 1054].) "So long as the basic conditions of compensation are otherwise satisfied [citation], and the employer's conduct neither contravenes fundamental public policy [citation] nor exceeds the risks inherent in the employment relationship [citation], an employee's emotional distress injuries are subsumed under the exclusive remedy provisions of workers' compensation." (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754 [7 Cal. Rptr. 2d 808, 828 P.2d 1195].)

Jones, 62 Cal.Rptr.3d at 212. Plaintiff fails to submit evidence the conduct complained of (i.e., denial of certain assignments) exceeds the risks inherent in the employment relationship. Absent such evidence, and absent a viable discrimination or harassment claim, Plaintiff's emotional distress claims are barred by the exclusivity of workers' compensation.

Eighth Cause of Action – Negligent Supervision

Plaintiff's negligent supervision cause of action is

premised on Defendants "duty to prevent discrimination and harassment" (FAC ¶168]. Absent evidence sufficient to support a discrimination or harassment claim, Plaintiff's negligent supervision claim fails. See, *Jones*, 62 Cal.Rptr.3d at 213-214.

Claim for Punitive Damages

In light of the above, Plaintiff has no remaining causes of action to support Plaintiff's claim for punitive damages.

Sanctions

A separate order will be issued on Defendants' request for sanctions, following submission of the additional briefs discussed at oral argument.

/s/
Judicial Officer Presiding: Judge Ronald L. Styn

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE

TENTATIVE RULINGS – OCTOBER 18, 2007

EVENT DATE: 01/04/2008

EVENT TIME: 02:00:00 PM DEPT.: C-62

JUDICIAL OFFICER: Ronald L. Styn

CASE NO.: GIC874160

CASE TITLE: DRISCOLL VS CB RICHARD ELLIS INC

CASE CATEGORY: Civil – Unlimited

CASE TYPE: Wrongful Termination

EVENT TYPE: Summary Judgment/Summary Adjudication (Civil)
CAUSAL DOCUMENT Motion for Summary Judgment and/or Adjudication, 08/03/2007
/DATE FILED:

EXCERPT OF RULING:

The comments made regarding "retread and reject" brokers [Plaintiff's Additional Facts 34] do not evidence discrimination or harassment *based on* Plaintiff's disability. The comments made by

Defendants Read and Woolson to Dr. Carlo [Plaintiff's Additional Facts 48] do not evidence discrimination or harassment *because of Plaintiff's disability*. Similarly, there is no evidence Defendants' conduct with respect to "Morgan Stanley" "BRAC" and "GSA Certification" was *because* of *Plaintiff's disability*. Construing all evidence in favor of Plaintiff, at best, these events reflect Defendants' attempts to divert Plaintiff's business to themselves. There is no evidence to suggest Defendants' were motivated by Plaintiff's disability.

[PAGE 5, TENTATIVE RULINGS]

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

WILLIAM DRISCOLL, Appellant, v. CB RICHARD ELLIS, INC., JEFFREY WOOLSON, MARK READ and WILLIAM CHILLINGWORTH, Respondents.	4th Civil No. D052929 SDCSC Case No. GIC 874160

Appeal from Judgment of the
Superior Court of California for San Diego County
Ronald L. Styn, Judge Presiding

REHEARING PETITION

David A. Niddrie, SBN 89990
NIDDRIE, FISH & BUCHANAN, LLP
750 B Street, Suite 2640
San Diego, California 92101
Telephone: (619) 238-6065
Facsimile: (619) 238-6036

Attorneys for Appellant
WILLIAM DRISCOLL

EXCERPT OF REHEARING PETITION:

Much of the concern about the judiciary's over-zealous use of summary judgment has focused on employment and discrimination cases. See Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases* (1999) 34 Wake Forest L.Rev. 71; McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases* (1993) 34 Boston College L.Rev. 203, 229. The respected commentators have expressed the belief that their judicial counterparts are guilty of improperly weighing the evidence, drawing inferences in favor of the moving party employer, and often making credibility determinations in such cases. *Id.*; see also *Nazir v. United Airlines* (2009) 178 Cal.App.4th 243, 248 [observing that "the summary judgment procedure has become the target of criticism on a number of fronts. Some particular criticism is directed to the procedure in employment litigation, including that it is being abused, especially by deep pocket defendants to overwhelm less well-funded litigants."]

Driscoll submits that even if the Court disagrees with the line of cases limiting *Aguilar's* "more likely" standard to antitrust conspiracy cases, the issue deserves more than a footnote dismissing Driscoll's "complaint" without even discussing contrary cases. Driscoll requests the Opinion be modified to fully discuss the reasons for the Court's choice between the conflicting judicial perspectives on this issue, and then published so that the Court's views can be added to the legal debate.[4] Since

unpublished opinions may not be cited in California (California Rules of Court, Rule 8.115), an unpublished opinion in this case would create one set of laws for Driscoll, a disabled veteran, and another for those entitled to published opinions. This would violate Driscoll's rights to due process, equal protect, and the rule of law.

[4FOOTNOTE OMITTED]

[PAGE 11 - 12, REHEARING PETITION]

DATED: January 5, 2010

NIDDRIE, FISH & BUCHANAN LLP

BY: /S/ NIDDRIE
DAVID A. NIDDRIE

February 28, 2006

Mark Read
4365 Executive Drive, Suite 900
San Diego, CA 92121

Mr. Read:
After much thought and reflection, by this letter and effective immediately, I submit my resignation from CB Richard Ellis. Wrongful changes in my duties and responsibilities have created a work environment that was at first embarrassing, then frustrating, and finally unacceptable. I have noticed dramatic changes in the way I was treated which were substantial factors in my decision to resign. So, after years of a wonderful, supportive and enriching work environment, the challenges created by my change in treatment, and by you and others in management, have become intolerable.

I noticed an abrupt change in my given duties and responsibilities after you informed me of a call you received from Unum Provident advising you of my combat related disability. It is unfortunate that the call and changes at work following that call occurred well after my disability had been identified and treated. This was well after I had implemented changes in my life and routines which allowed me to be as productive for CB Richard Ellis as I had always been. I believe that my work performance since mid 2003, including winning the 2004 San Diego Commercial Real Estate Land Broker of the Year for Buyers and 2004 Top Producer Award

North San Diego County, clearly demonstrated that my substantial effort to identify, accommodate and overcome my disability was a success.

As you know, I was previously very successful in every endeavor. However, my recent disparate treatment by CB Richard Ellis makes it clear that there is no longer a place for me with CB Richard Ellis. My performance evidences that I am not responsible for your adverse decision to take substantial business from me, e.g. Bressi Ranch; to divert business opportunities identified and developed by me to others, e.g. BRAC properties; and to relegate me to the marketing of mini-warehouse sites.

I have approached every job assignment with great enthusiasm even after my disability was identified and treated. I worked hard to excel. I was determined, not to let the disability do to me what it had done to so many others. In that I succeeded. However, CB Richard Ellis has wrongfully determined that it is appropriate to exclude me from business assignments to which I was entitled. We take time to learn about ourselves and our world in large part to work and be productive in community. Therefore, I truly grieve the fact that my unfair treatment has created a work environment where coming to work is no longer challenging, fun, or tolerable. I leave to find a place where I am treated fairly.

Sincerely, Bill Driscoll

FACSIMILE TRANSMISSION

DATE: November 19, 2002
TO: Donna Casey
FAX NO.: (949) 809-3717

Donna,
We received this fax from UNUM today. Mark just spoke to Bill Driscoll and he would like to respond to this inquiry.

According to Bill Driscoll, Unum/Provident is his personal insurance carrier. He has a personal disability policy with Provident/UNUM.

Bill went to the VA in February, 2002. The VA said that Bill has a severe case of battle fatigue and PTSD (Post-Traumatic Stress Disorder). He has been on 100% medical disability since June, 2002.

Please advise on how we should respond to this request.

Thank you.

Mia Bagaybagayan
Office Services Manager
CB Richard Ellis, Inc. – San Diego Region
(858) 646-4728 Phone
(858) 646-4742 Fax
mbagaybagayan@cbre.com

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

WILLIAM DRISCOLL, an individual, Plaintiff, vs. CB RICHARD ELLIS, INC., a Delaware Corporation; MARK READ, an individual, JEFF WOOLSON, an individual, and WILLIAM CHILLINGWORTH; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, et al, Defendants.	Case No. GIC874160 DECLARATION OF WILLIAM P. DRISCOLL

I, William P. Driscoll, declare and state as follows:

01. I am the plaintiff in this matter. I am 60 years old and am competent to testify in the courts of the state of California. I make this declaration upon personal knowledge, except where stated upon information and belief.

02. I was raised in Massachusetts. In 1968, I graduated from Stonehill College, Easton, Massachusetts with a Bachelor of Arts in Economics.

03. In 1969, I joined the United States Navy and entered Officer Candidate School in Pensacola, Florida. In the spring of 1970, I received my wings as a Navy Flight Officer and was assigned to an F-4 Phantom fleet replacement squadron in San Diego, California. During 1970-71, I went through flight training as an F-4 Phantom Radar Intercept Officer (back seater/RIO) with VF-121. In mid 1971, I was given orders to join Navy Fighter Squadron 96 (VF-96) and to deploy to the Gulf of Tonkin, to fly combat missions against North Vietnam off the aircraft carrier USS Constellation.

04. During 1971-72, I flew approximately 153 missions in support of the United States military's orders to support the government and people of South Vietnam in their struggle against communism.

05. I flew my last combat mission on May 10, 1972. On that mission, which was into the heartland of North Vietnam, the United States Navy airplanes were attacked by approximately 26 enemy fighter aircraft (MIGS) flown by the North Vietnam Air Force. On May 10, 1972, Randy Cunningham and I shot down a third, fourth, and fifth MIG, becoming the United States Navy's only air aces of the ten year Vietnam conflict.

06. After shooting down the three enemy aircraft our F-4 Phantom was hit by a surface-to-air missile (SAM), while attempting to exit North Vietnam and return to the aircraft carrier. For what seemed like a substantial period of time, Cunningham and I remained with a very damaged aircraft while it was on fire in an attempt to leave

the North Vietnam land mass behind and reach the relative safety of water.

07. Approximately 5 miles out to sea, Cunningham and I ejected from the burning aircraft at or about the time Cunningham lost complete control of our F-4 and it exploded.

08. After a short battle between North Vietnam boats, trying to capture us, and U.S. Navy personnel sent to rescue us, I was rescued at sea and eventually returned to the deck of the USS Constellation, the aircraft carrier from which I had launched on my final combat mission into North Vietnam.

09. Upon information and belief, the Navy, concerned about our fate should we, as MIG Aces, be shot down and captured, and/or because of our potential value stateside, ordered Cunningham and I out of combat and to return to San Diego.

10. In 1972 and 1973, I gave hundreds of speeches to American service men and women and American citizens related to our May 10, 1972 mission, my combat experiences, and the lessons learned from those experiences.

11. The air war against North Vietnam ended in early 1973. Therefore, I saw no more combat after May 10, 1972.

12. After leaving VF-96, I was ordered to the Navy Fighter Weapons School (TopGun) as an instructor. I was a flight instructor at TopGun for approximately three years. During this time, I was asked to give presentations or lectures on the May 10, 1972 MIG kills, my combat experiences, and the lessons I learned from those experiences.

13. I stayed on active duty with the United States Navy until 1981. After TopGun, I was ordered to join Navy Fighter Squadron 2 (VF - 2) flying the F-14 Tomcat, deployed aboard the carrier USS Enterprise. From approximately mid-1979 to mid-1981, I served as an F-14 flight instructor training fleet replacement pilots and back seaters learning to fly the F-14, at sea and in combat. When I left active duty, I joined the United States Navy Reserves. At that time, I was a Lieutenant Commander.

14. While on active duty, I obtained a master's degree in Systems Management from the University of Southern California.

15. From 1981 to about 1989, I flew with the Navy Reserve Squadron VF – 301, flying F-4 Phantoms and F-14 Tomcats. I also at times, flew with TopGun and spoke to TopGun students. I retired from the United States Navy as a Commander in 1989. However, after retiring from the Navy in 1989, I returned to the reserves in 1990 and finally fully retired in 2003.

16. After leaving active duty, I sought and received a position with Coldwell Banker as a commissioned salesperson selling and leasing commercial property. I was hired by Coldwell Banker in 1981 and assigned to its office in Carlsbad, California.

17. Prior to approximately 2000, I was very successful as a commercial real estate salesman. I received the "Salesman of the Year" award from Coldwell Banker for the North San Diego County for 1985, 1986, and 1988. I was informed and believed that this award was given to me because I was the

top income producer for those years in the Carlsbad office. In 1990, I was recognized as being the "Top Producer" for Coldwell Banker Commercial in the San Diego North County Office (Carlsbad).

18. My net income for 1986 through 1990 was as follows: 1986-$208,520; 1987-$114,516; 1988-$228,293; 1989-$117,263; and 1990-$243,869.

19. The early 1990's were a difficult time for commercial real estate in San Diego County. My income from commercial real estate was as follows: 1991-$116,295; 1992-$122,716; 1993-$57,022; and 1994-$117,614.

20. In 1995, my mother got very sick. She lived in Massachusetts and I spent a substantial amount of time tending to her needs. She died in 1996. Therefore, my income from commercial real estate in 1995 was $37,970 and my income for 1996 was $106,186. In 1997, I returned to full productivity and my income with CB Richard Ellis (previously Coldwell Banker Commercial, herein CBRE) was $252,715. In 1998 it was $300,540. In both 1997 and 1998, I received recognition for what was called by CBRE "Career Best" years.

21. In 1999, my father got ill. He was living in Massachusetts. Again, his needs required my time and attention. In 1999, I made $90,043 from CBRE for my commercial real estate activities.

22. My father and I had had a difficult relationship. He was a life long alcoholic. While in college and in the Navy, I had used alcohol to excess on far too many occasions. In 1982, after getting married and while considering children, I made a personal decision not to ever have my children see me in the same condition as I had often seen my

father. I determined, on my own, that I should consider myself an alcoholic, get educated on the subject and stop drinking. I took my last drink of alcohol in 1982 without entering any treatment program, except voluntarily attending AA meetings for educational purposes.

23. After Vietnam, I had difficult nightmares and thoughts, at times, regarding my combat experience. I had hoped that stopping the use of alcohol might end those nightmares and thoughts. It made them less severe, but they did not go away. However, I believed that I had learned how to appropriately deal with these nightmares and thoughts, and I believed that I was an industrious, productive, thoughtful, and a caring husband, father, employee, and citizen.

24. After leaving active duty in 1981, and until 1990, I gave a talk or presentation on my combat experience only a handful of times. The presentations were to TopGun students and instructors in 1984, Canadian Air Force pilots in 1986, TopGun students and instructors in 1988, and Marine pilots and flight officers in 1989.

25. Beginning in 1990, I am informed and believe that the Navy apparently determined that my combat experience should be shared with Navy fighter crews in a more systematic and continuing nature. In 1990, TopGun provided its visual aid experts to help and assist me in putting together a series of slides to go along with my presentation. The fighter pilots and back seaters I was asked to address faced a new threat in 1990 and early 1991; the Gulf War. At this time, I noticed that the talk became more challenging and more personal. I was

having trouble sleeping and having more nightmares. I asked the Navy if they could make a video of my talk so that I would not have to repeat it. I also asked them to consider replacing me with another instructor. I was informed and believe that TopGun and the Navy believed that my presentation was more effective and powerful if given live and both insisted that I continue to do the presentations. I talked to TopGun and other Navy fighter squadrons heading to the Gulf War approximately 8 times in 1990 and 1991.

26. About this time, I believed that much of what I had learned in combat and in the business world could be put to use in talks directed at team building and peak performance for sports teams, schools and businesses. I believed that my combat experience could have value to people and organizations not engaged in the business of killing. I developed a program or presentation which I called "How to Maximize Your Peak Pressure Performance" (Peak Performance).

27. Beginning in about 1990, the "Peak Performance" presentation was given to different types of groups, at their request. These groups included the University of Notre Dame Football Team, the Harvard Business School Club of San Diego, Stonehill College, CB Commercial, the Federal Bureau of Investigation, Encinitas Chamber of Commerce, the Naval Academy Football Team, Ohio Trial Lawyers, Franklin Life Insurance Company, American Fighter Aces Association, the University of Michigan Football Team, the L.A. County Sheriffs' Pistol Team, the Torrey Pines High School Football Team, Texaco, Susanville Prison, the

Oregon Football Team, the Blue Angels, the U.S. Naval Academy, the U.S. Air Force Academy, Nationwide Insurance, San Diego American Inns of Court, Robert A. Banyard Inns of Court, and others.

28. Beginning sometime before 2001, my ability to handle my troubles sleeping, concentrating, and processing my repeated nightmares started to get away from me. It was impacting all aspects of my life, however, I either ignored or simply failed to recognize that I had a mental condition that might require treatment.

29. On one occasion, I left work embarrassed about a verbal exchange with a secretary with whom I was working. There were times when I was unable to understand what was happening to me. It impacted all aspects of my life. I went to work every day, however, little or nothing was getting accomplished. In part, I believed it was simply because of my lack of ability to sleep as well as due to receiving little or no assistance in the office. Many of the staff assigned to me in the CBRE Carlsbad office were temporary help, not qualified to do the work assigned. My income in 2000 was $142,991, 2001 was $32,284 and my income in 2002 was $16,209. In 2001 and 2002, no one at CBRE talked to me about my performance or my income. I was isolated, not understanding what was happening to me. However, my life, as I knew and understood it, was unraveling.

30. In late 2001 or early 2002, the brother of a young man on my son's high school baseball team asked to interview me on my Vietnam combat experiences. I agreed. I was surprised by the interview. The questions included whether or not I

had trouble sleeping, nightmares, bad thoughts, and any depression. I answered them as best I could even though I was surprised by some of the questions.

31. A short time later, the father of that young man approached me at one of my son's baseball games. He told me he had read his son's report and that he had watched me at a couple of public gatherings. He told me that he had seen combat in Vietnam and had been struggling with Post Traumatic Stress Disorder (PTSD) since Vietnam. He asked me if I knew about PTSD. He then said something to me that really surprised me. He said that he thought I was suffering from PTSD. He told me that there were very good people at the San Diego Veterans' Administration who could be helpful to me. He told me that I owed it to my family to go to the Veterans Administration for help.

32. I went home from the meeting surprised and troubled. Upon honest reflection, I knew I had had trouble sleeping for years and had struggled with difficult nightmares and thoughts. I knew that my condition was getting worse. I had not been able to get a handle on what was happening to me. As a result, I had been sleeping on the downstairs couch for a number of years, so as to not keep my wife awake by my screaming and pacing. I had not had more than two to three hours of sleep any night for a number of years. In addition, tasks at work that used to take an hour took four or five hours and tasks that took four or five hours did not get done sometimes.

33. In February of 2002, I went to the Veterans Administration (VA) in San Diego for an

interview. My medical records of that visit begin with "54 year old white male presents to PEC with disabling symptoms of PTSD." After a series of visits and meetings, I was informed that I had PTSD. At first, I was unwilling to accept the diagnosis. Then, I thought it was like the flu and once diagnosed and treated it would go away. I was wrong on both initial conclusions reached after the diagnosis.

34. After initially dealing with my embarrassment of having a diagnosed mental illness, I shared this diagnosis first with my wife. She said she was not surprised. After understanding that the disability would not go away, I did what I had done with difficult issues all my life. I threw myself fully into treatment, education, and implementing the changes necessary so that PTSD did not do to me what it had done to so many other unfortunate people.

35. I was advised that a substantial risk of PTSD was depression. I was advised not to crawl into a hole and hide from the world. I was advised to get educated, take medication, and try to remain involved in work, life, family, and other interests. Finally, I was advised to make several changes in my life, including making sure, even if I could not sleep that I was in bed at a regular time, lights out, TV off, and attempting to rest. Even with this advice, I was told that pursuant to the VA's regulations I qualified as disabled and began receiving VA benefits.

36. Before I accepted the VA benefits, I was advised that I should and could continue to work as a commercial real estate salesman. I then

remembered that I had two disability policies. One was a private individual policy that I purchased in the late 1980s; the second was a group policy provided by CBRE. I reviewed the policies and determined and believed that to receive benefits under the group policy I would have to quit work. Under no circumstances did I intend to quit work. I therefore applied for disability benefits under the individual policy which I believed allowed for disability benefits while working, if the disability impacted my income.

37. From the time I accepted the diagnosis of PTSD, it was my goal and my intention to learn to live with, to learn to deal with, and to fully understand what had happened to me. From the time I accepted the diagnosis, it was my intention to return to full productivity. I was very proud of my work and my position with CBRE. Going to work every day, trying to provide a valuable service to my clients, and to provide for my family was and is an important part of my identity.

38. I did not tell anyone at work about the diagnosis for fear of repercussions. A review of the individual disability policy disclosed that I could continue to work, make money and receive disability benefits from the second policy if I met certain criteria or the definition of disability under the policy. I was advised by the insurance broker who sold me the policy that I should submit a claim under that policy. I did.

39. Shortly after I applied for benefits under the individual policy with defendant Unum Provident, Unum Provident began making my life much more difficult.

40. I intentionally did not advise anyone at CBRE. I firmly believed if they found out about my PTSD, it would be the end of my career in the commercial real estate business. I worked in a company dominated by healthy younger white males. During my 25 plus years with CBRE, I do not remember seeing or meeting a salesperson, broker, or supervisor of color. I do not remember seeing or meeting anyone with a known or identifiable disability. In addition, I had witnessed acts of harassment and discrimination between senior managers and female staff. I did attend some classes on sexual harassment conducted by in house counsel after I learned, from internal gossip, that Mr. Chillingworth had been "promoted" to Australia to avoid answering to or about conduct between him and one of his female assistants. I do not know if the rumors about Mr. Chillingworth's reason for a transfer to Australia were true or not, but those rumors led me to believe that making specific complaints to Mr. Chillingworth or the CBRE in house attorney about my treatment after February of 2003 would be futile.

41. I was, and remain, deeply embarrassed by my diagnosis. I believed and continue to believe that problems caused by people's reaction to the diagnosis, does make my journey with family, friends, business associates, and others in the community more difficult.

42. After being diagnosed with severe PTSD, I did make substantial changes to my life, including education, medication, therapy and life style in a serious attempt to become fully productive at work, at home, and in the community.

43. Before the diagnosis, treatment, and the education, work activities or assignments in 2001 and 2002, which in the 1980's took 2 hours to complete, now took 6 to 8 hours to understand, organize, master and complete successfully. Many things did not get done. After diagnosis, treatment, and education, most activities that had been taking 6-8 hours, and which should be done in 2 hours, now could be done in 4-5 hours. Tasks that previously went uncompleted began getting done and I was excited about work again.

44. However, in 2002, dealing with Unum Provident became progressively more difficult. Unum Provident asked me to submit the same information, again and again.

45. In early 2003, I received a phone call from Mark Read. In that phone call, Mr. Read advised me that he had heard from Unum Provident about my medical condition, he was sorry, and I could take as much time off as was necessary. I was shocked and dismayed. I do not remember the exact words used by Mr. Read in that conversation. However, I simply listened. At the end of the conversation, I advised Mr. Read that I did not need any time off and that I intended to continue working. When the conversation ended, I believed and understood that Mr. Read knew that my medical issues were mental and not physical, and that I had been working with the VA. I do not recall if he used the words PTSD. He could have only gotten the information from Unum Provident.

46. I attended the depositions in this matter and reviewed the documents produced by defendant CBRE. One document is a November 19, 2002

"Note" from Mia Bagaybagayan, assistant to Mark Read, to Donna Casey, who I understand and believe, from testimony in this matter, to be an employee in the Human Resources department of CBRE. In that note, Ms. Bagaybagayan states in part: "Bill went to the VA in February, 2002. The VA said that Bill has a severe case of battle fatigue and PTSD (Post-Traumatic Stress Disorder). He has been on 100% medical disability since June, 2002." I did not provide any of this information to Mr. Read or Ms. Bagaybagayan.

47. At no time, during my entire employment with CBRE, did I ever hear a complaint about my performance on any assignment from any client or any supervisor. After Unum Provident contacted CBRE, I never heard from anyone in Human Resources offering any accommodations. After the one phone call from Mr. Read, I heard nothing more from him regarding my health or my needs or offering any accommodations.

48. I began to seriously work on improving my work performance. Treatment, education, and changes improved my concentration, made me more productive, allowed for more sleep, and I began to get work completed. I was again, excited about work and throwing myself into several large and potentially very lucrative assignments. Since 2002, under the guidance of my doctors, I have tried several different combinations of medicines for my PTSD. I continue to go to therapy. Presently, I am prescribed and am taking Effexor and Lithium.

49. At my deposition, I was asked if anyone at CBRE was trying to injure or hurt me. I answered no. I understood the question to be whether anyone

at CBRE tried to or had physically assaulted me. I did not understand the question to include my opinion about whether they intended to discriminate against me. Had I been asked that question, my answer would have been yes.

50. In 2003, I asked for accommodations from CBRE. I complained on several occasions to my immediate supervisor, Jeff Woolson that I did not have a secretary assigned to work directly with me and that I had recently again gone through a number of temporary secretaries who had trouble doing my work without a lot of errors. Mr. Woolson appeared to listen; however, additional or more qualified staff was not provided to me.

51. In the fall of 2003, when CBRE was competing for the follow on work with Sares Regis on Bressi Ranch, Mr. Woolson, my immediate supervisor complained to me that the CBRE Carlsbad office was full of retread and reject brokers. While Mr. Woolson did not name me directly as a retread and reject broker, it was clear he was talking about me because I was the oldest and most senior salesman at Carlsbad, and I was not aware of any other salesman in the office who had either a mental or physical medical condition of any kind. This was a statement made by Mr. Woolson, directly to me again in 2004. Both these comments were made to me after Mr. Read was advised of my PTSD by Unum Provident.

52. Prior to 2003, no one at CBRE had ever been critical of my work on any assignment or of my work with any client. During all weeks and months in 2000, 2001, 2002, and 2003, I went to work and tried to be as productive as I could possibly be which

admittedly, in 2000 and 2001, was not very productive. I went to work because I believed I could do the work, wanted to provide for my family, and desperately wanted to work.

53. In late 2002 or early 2003, at a time when treatment and education were allowing me to become much more productive at work, I made contact with Dan Donoghue, a man who had previously served in the Navy and flew F-14's out of San Diego. At that time, upon information and belief, I understood Mr. Donoghue was Group President for a defense contracting firm called Titan. I understood from our several meetings that he supervised over 600 employees, $85,000,000.00 of business and approximately 6 leased properties in the San Diego area. One property was a large corporate center and the broker fees for that leased area represented the potential for a large commission.

54. From my meetings with Mr. Donoghue, I understood and believed that there might be a substantial business opportunity for CBRE to do the Titan broker work in the San Diego area. I took that information to Mark Read in early 2003. Mr. Read listened and advised me to continue to work with Mr. Donoghue and others at Titan. Orally, Mr. Read assured me that if CBRE got any Titan work, that I would be involved at all levels in CBRE with Titan assignments in the San Diego area.

55. After my meeting with Mr. Read, I learned in mid-2003 that CBRE purchased the Brokerage Company (Insignia), which had been representing Titan, nationally and internationally. And, I learned that the San Diego salesman, who

headed up the San Diego/LA team, was leaving CBRE (Insignia). I went to Mr. Read and asked to be considered for that position. Instead, upon information and belief, I learned that Mr. Read recommended two commercial sales persons out of his office for the position: Michelle Candland and then Bill Bacon. Eventually, upon information and belief, I learned that the open team leader position went to Mark Sprague. I believed I was better qualified for the San Diego position than either Michelle Candland or Bill Bacon. I do know I was never considered for the position, contrary to the earlier statement made by Mark Read, which was that if CBRE got the Titan business, I would be involved at all levels with Titan in the San Diego area. And, upon information and belief, I understood that Titan used the services of a San Diego CBRE salesman on at least one assignment in 2003-2004 and I was never even considered by anyone in CBRE for that assignment. My background, experience and prior relationship with the client made me very qualified for that assignment.

56. In early 2003, I learned that CBRE had a listing from Metropolitan Life to sell a 132-acre "Ranch" in Carlsbad, California called Bressi Ranch. I was very familiar with the property. It was located in the middle of an industrial, commercial part of the county where I had, in the past, been involved in many sales and lease transactions. In the mid 1980s, I had been involved in the sale of land in Carlsbad to a company by the name of SAMMIS, which in 2003 was then Sares Regis. I believed that Sares Regis would be interested in Bressi Ranch and

I believed it was an excellent business opportunity for a company that had access to $30,000,000.

57. For a period of several months I worked, by myself, in providing the information to Sares Regis, primarily to Peter Rooney and Larry Lukanish, for the partnership to make a decision to purchase the property. Two other CBRE commercial salesmen, Rick Sparks and Matt Strockis, were representing the seller of Bressi Ranch. During the bidding process I became concerned that a company bidding against Sares Regis for the property appeared to be getting inside information on what I was doing with Sares Regis. I approached Matt Strockis, who also worked out of the CBRE Carlsbad office, and advised him of my concerns. Mr. Strockis, in a closed door meeting, advised me that he was concerned that Biff Smith, an outside broker working with Mr. Sparks, may be sharing my work with Sares Regis with a Sares Regis competitor, RREEF.

58. With this information and belief, I advised Sares Regis to make its next bid directly to Metropolitan and to not go through CBRE or Mr. Smith. Sares Regis followed my advice. Shortly thereafter, Sares Regis was announced as the successful bidder for the Bressi Ranch property in Carlsbad. I was very excited and pleased. I had worked approximately 15 hours a day, 6 days a week, for the past month on the project. Admittedly, work activities were still taking twice as much time as previously and I was still having substantial difficulties with concentration, detail work, and some depression and frustration, however, treatment and

education had allowed me to get back into the game. I truly believed I was on the path to full productivity.

59. Repeatedly, I was praised by Sares Regis, orally and in writing, for my excellent work in bringing the opportunity to Sares Regis and for all my work, on its behalf, in ensuring Sares Regis was the successful bidder. In the industry, and especially within CBRE, the procuring salesman has an expectation of having a substantial position or role in any remarketing of a commercial or industrial property or project when CBRE is selected as the broker for any remarketing services, and the procuring salesman shares in a substantial portion of the next generation of commissions depending on the role, but in no event is the percentage expected to be less than 25%. However, at the first meeting of brokers with Sares Regis, after Sares Regis was announced as the successful bidder, Mr. Smith, the outside salesman working with the CBRE team representing the seller of Bressi Ranch, in a room full of people nastily attacked me and my credentials. I was very surprised; however, I did know that Matt Strockis had advised me that Mr. Smith might have been working with RREEF to make sure RREEF was the successful bidder. At this meeting, where I was being verbally attacked by Mr. Smith in front of the Sares Regis principals. Rick Sparks was not there and Matt Strockis made no statement or argument in my defense. That also surprised me.

60. There was substantial due diligence work left to be done. I continued to work for Sares Regis because I believed that I was going to have a substantial role in the resale of Bressi Ranch

property after permitting, improvements and land division work was done. During the due diligence period, I was again repeatedly praised, orally and in writing, for my timely, professional, and excellent work in providing all information requested by Sares Regis during the due diligence period.

61. Several weeks after it was announced that Sares Regis was selected as the buyer of Bressi Ranch, I was advised by Mr. Read and Mr. Woolson that Sares Regis did not want me on the CBRE remarketing team. I was shocked. Mr. Woolson told me that Sares Regis did not believe that I was a team player and I was not the type of person they wanted representing them. Again, I was shocked. I put together a presentation, directly arranged a meeting with Mr. Rooney and Mr. Hagestad, and offered substantial reasons as to why I should be a member of the remarketing team. At that meeting I was told by both Mr. Hagestad and Mr. Rooney that the decision regarding my role in any remarketing efforts by CBRE was being left up to CBRE.

62. Until I attended the deposition of both Rooney and Hagestad, I was not aware that both had called Mr. Sparks of CBRE and advised Mr. Sparks that Sares Regis wanted me on the team but not in the lead role. I never asked for the lead role and never expected the lead role. I did ask for and did expect to have a substantial role in the remarketing team. I also expected to participate in the remarketing commissions paid to CBRE at a rate no less than any other member of the team, other than Lannie Allee, the team leader.

63. After the meeting with Sares Regis, a January 2005 Listing Agreement was signed with

Sares Regis and I was listed, with four others, as a member of the Core Team. However, when CBRE prepared and disseminated the marketing information brochure in late January of 2005, my name was not on the team. Again, I was shocked. After my meeting with Mr. Hagestad and Mr. Rooney, I was advised by my CBRE supervisors that I was not to attend any marketing team meetings, I was not to take any proposed deals to Sares Regis, I was not to have any direct contact with Sares Regis, and my role if any, was to bring any work on Bressi Ranch to Rick Sparks. I complained to my supervisors. Notwithstanding my meeting with Sares Regis and Mr. Rooney's phone call to Mr. Sparks, this directive from Mr. Read and Mr. Woolson did not change. I continued to complain to them. The frame work for my involvement in Bressi Ranch, outlined by my supervisors, basically made it impossible for me to accomplish or do anything productive on the remarketing activities. Until the first resale, I never did have an clear understanding of what my share of any broker fees might be on any sale or lease, even if I was the salesman who found a buyer or tenant.

64. Prior to Bressi Ranch and the contact between Unum Provident and Mark Read, I had always been given a substantial role, by CBRE, in any remarketing activity when I was the procuring broker for the project. After, early 2003, I was not given a single outside assignment, project, or duty by any of my supervisors at CBRE. Prior to the call from and conversations with Unum Provident, even during the several years when my disability got away from me and I was not very productive, I was

allowed free reign to deal with all my clients and assignments in whatever manner I deemed appropriate. All that changed after the contact between Unum and CBRE in late 2002 or early 2003.

65. In an attempt to have my supervisors, Mr. Read and Mr. Woolson, better understand that I was still productive and valuable, I arranged a lunch meeting in October of 2003 between them and one of my most important clients, Dr. Dennis Carlo. At that lunch meeting, I excused myself to go to the bathroom. When I returned it was clear to me that Dr. Carlo was very upset. After Mr. Read and Mr. Woolson left, Dr. Carlo asked me why I would work with Mr. Read and Mr. Woolson. Dr. Carlo went on to say that while I was gone they had both bad mouthed me and both had suggested that Dr. Carlo should be using other CBRE brokers to do his business instead of me because CBRE had much more qualified and experienced brokers working for CBRE than me, all who could do a better job for Dr. Carlo than me. Prior to this meeting Dr. Carlo and his business activities had been a very important client of mine and CBRE. Dr. Carlo's real estate assignments had created more than $750,000 in broker commissions being paid to CBRE.

66. I continued, during all of 2004, to attempt to educate and demonstrate to my supervisors at CBRE that I was back in the game. In 2004, I was again the top producer in the Carlsbad office and made $526,710 in broker fees for CBRE, being paid one-half of those fees. Therefore, I made $263,355 in 2004.

67. Because I was allowed by CBRE to have no role in the Bressi Ranch remarketing activities, I

looked for other business. I learned that two government programs, known as BRAC and GSA assignments, potentially could involve substantial commercial sale and lease broker fees. I put substantial efforts into convincing my superiors to provide me the necessary support to attempt to obtain both BRAC and GSA work. However, at every turn, I encountered road blocks placed in front of me by Mr. Read and/or Mr. Woolson. Ignoring their oral and written promises to me, ultimately those assignments were given to others in CBRE.

68. In 2004, I contacted one of my oldest and best clients, Morgan Stanley, about an assignment in Carlsbad. Barbara Kiley, head of Morgan Stanley's western real estate department, asked me to determine what the broker fees charged by CBRE for that assignment would be. I approached Mr. Read and advised him of the Morgan Stanley request. Mr. Read told me he would get back to me. When I did not hear back from Mr. Read on this issue, I again called him, over and over again, requesting an answer. Over and over again, Mr. Read advised me that he would get back to me. Mr. Read told me not to do anything on the Morgan Stanley assignment until he approved my working with Morgan Stanley.

69. After waiting almost a month for Mr. Read's answer, I asked him why I was getting no support. I was then advised that any Morgan Stanley assignment would be handled out of the CBRE New York office. I was given the name of the CBRE broker/salesman in New York who supposedly was in charge of all Morgan Stanley assignments. I traveled to New York to meet with that broker. I

was finally able to talk to him and his response to me was that his office and he in particular were not interested in handling any assignment which was less than 50,000 square feet. I was shocked and surprised. The space assignment in Carlsbad that Ms. Kiley was looking for was about 12,000 square feet. Finally, out of frustration, I ignored the road blocks of Mr. Read and decided to find Morgan Stanley/Barbara Kiley the space they wanted to lease in Carlsbad even if I received a reduced commission.

70. When I took on the Morgan Stanley assignment without the permission of Mr. Read, I advised Ms. Kiley that the landlord would have to pay CBRE its normal broker fee and the landlord could pay me whatever was appropriate. When the assignment was complete, the San Diego CBRE office received about $122,000 in broker fees and CBRE paid me approximately $61,500. Prior to 2004, Morgan Stanley had been a large client of mine and CBRE. My work with Morgan Stanley had produced more than $1,000,000.00 in broker fees for CBRE. After this assignment, Mr. Read never changed his direction to me that the Morgan Stanley work was to be done by other CBRE brokers out of the New York office.

71. I am informed and believe that Mark Read wrote on the Voucher Report for the Morgan Stanley assignment that he "flew to SF (San Francisco) to meet Barbara Kiley of Morgan Stanley with Bill, and I helped him collect a full fee when he wanted to discount it." Nothing could be further from the truth. It was Barbara Kiley, not Mark Read, who assisted me in receiving the full

commission. From January 2003, no supervisor in CBRE helped me in any way.

72. In 2003, I complained bitterly to Michelle Candland, assistant regional manager for CBRE, about my disparate treatment regarding the Titan account/assignment. In particular, I complained about Mark Read's failure to honor his promise to me regarding participation on the Titan account. I expected her to intervene on my behalf. She did nothing. She appeared to go out of her way to make sure I would have no further contact with anyone at Titan.

73. In 2003, 2004, and 2005, I complained often to both Mr. Read and Mr. Woolson about my treatment regarding my role in the Bressi Ranch remarketing team. When my complaints fell on deaf ears, I went directly to Sares Regis. I was told by Sares Regis, that the decisions regarding my role in any follow on work were being made by CBRE. This information was directly contrary to what Mr. Read and Mr. Woolson were telling me. I continued to provide information and argument to Mr. Read, regarding my qualifications for and participation on the re-marketing team. All that happened is that I was excluded from team meetings and prohibited from having any contact with Sares Regis.

74. In late 2004, I complained over and over again to Mr. Read regarding my failure to get any support from CBRE for the Morgan Stanley assignment in Carlsbad. I was advised by Mr. Read the he was researching the matter with CBRE New York management. I went to CBRE in New York for assistance. Upon information and belief my trip to New York City disclosed that Mr. Read had not been

truthful with me. The Morgan Stanley Carlsbad assignment was not being handled in New York. On this assignment, ultimately, I had to act independent of CBRE and Mr. Read's direction to successfully complete the assignment.

75. In 2005, I obtained a written agreement from Mr. Read that I would be in a senior leadership position on any CBRE Base Realignment and Closure (BRAC) Team. However, when the initial BRAC CBRE organizational chart was published I was relegated to a very minor role.

76. In 2005, I was disgusted with Mr. Read, the regional office and its failure to assist me or allow me to significantly participate in any way on any matter or assignment, except the Bressi Ranch initial sale and the Morgan Stanley Carlsbad assignment both of which I did on my own, since early 2003. I knew he knew about my PTSD and I reached the conclusion that he intended to block any assignment I might locate. I could not imagine that Mr. Woolson did not know about my PTSD because I knew Mr. Woolson and Mr. Read met and talked regularly. Mr. Read was in the Carlsbad office weekly, with the door closed, talking with Mr. Woolson about office matters. A business opportunity with Government property (GSA) was taken by me to Mr. Woolson. I asked Mr. Woolson to support me in my efforts to get myself assigned to the CBRE GSA billet opening. I researched the procedures necessary to obtain a transfer of the CBRE GSA billet from Don Spradlin to me. I spent five months learning the procedures and completing the prescribed government steps to obtain that billet. After five months of effort, I discovered from an

Email that Mr. Woolson was taking the billet for himself. I complained bitterly and bluntly to Mr. Woolson about this unfair treatment.

77. At this time, it was obvious that no one in CBRE management intended to help me or assist me in any assignment or any further work. In fact after three years, it was obvious that all were aggressively taking work and assignments from me which had been brought to CBRE by my own initiative and hard work.

78. Even during the most difficult times of the PTSD and before the diagnosis, my education regarding PTSD and treatment, that is during 2000, 2001 and early 2002, I looked forward to coming to work every day at CBRE. After Mr. Read informed me of the Unum contact, my work environment became very toxic. The toxicity of my work environment delayed and hindered my return to full productivity and eventually made it impossible for me to come to work and make a living. If I had continued at CBRE, I believed and was informed so by my health care providers that I could reasonably expect to have increased difficulties in coping with my PTSD, i.e., my work environment at CBRE was bad for my mental health. I could not emotionally or physically accept a return to my 2000-2001 condition.

79. CBRE continues to represent owners, buyers, landlords and tenants for land and improvements at the Bressi Ranch property. It continues to be a very profitable business relationship for CBRE and the Carlsbad commissioned salespersons assigned to the Carlsbad office.

80. From the time I was removed from the Bressi Ranch marketing team, I found it difficult if not impossible to continue to work at CBRE. The BRAC and GSA assignments both related to government/military properties. I felt I was uniquely qualified for that type of work. In 2005, the CBRE assignments related to that government work went to others I felt were not as qualified for those assignments. I was left with no choice but to leave CBRE and seek a living elsewhere because it was clear I was done at CBRE.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of October, 2007 at San Diego, California.

/s/ William P. Driscoll

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

WILLIAM DRISCOLL, an individual, Plaintiff, vs. CB RICHARD ELLIS, INC., a Delaware Corporation; MARK READ, an individual, JEFF WOOLSON, an individual, and WILLIAM CHILLINGWORTH; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, et al, Defendants.	Case No. GIC874160 DECLARATION OF DENNIS CARLO

I, Dennis Carlo, under penalty of perjury, declare and state:

01. I am 63 years old and am competent to testify in the courts of California and make this declaration upon personal knowledge.

02. I have a Ph.D. in Immunology and Medical Microbiology from Ohio State University. After graduation, my first position as scientist was at Merck and Co. I spent ten years at Merck and Co. While there, I was intimately involved in the

development of a number of vaccines. As Director of Development and Basic Cellular Immunology and Director of Bacterial Vaccines and Immunology at Merck and Co., I oversaw research and product development for Pneumovax (14-valent polysaccharide vaccine), Meningovax A, Meningovax C, Meningovax A-C and H, *influenzae* type b. I also directed a multi-disciplinary task force whose goal was the development of novel adjuvants. After 10 years at Merck and Co., I joined a start-up company by the name of Hybritech. Hybritech eventually became one of the most successful Biotech Companies in the industry. While at Hybritech, I served as Vice President of Research and Development and Therapeutic Manufacturing. At Hybritech, I put together a successful program to carry out research and development in the area of monoclonal antibody and cancer therapy. In 1985, Hybritech was sold to Eli Lilly & Co. That transaction was for approximately $485,000,000.00 and represented large profits for shareholders and investors.

03. After approximately 2.5 years at Eli Lilly & Co., I was fortunate enough to meet Dr. Jonas Salk. At that time, Jonas Salk, myself and a few other individuals founded The Immune Response Corporation. While at The Immune Response Corporation, I served as Chief Technical Officer, President, and Chief Executive Officer. At Immune Response, I established programs in autoimmune disease, cancer, gene therapy, and AIDS. In 1991, Ernst & Young named me Biotechnology Entrepreneur of the Year. I have extensive experience in biotech. I am widely regarded as one

of the "Founding Fathers" of the biotech industry in San Diego. After Immune Response, I served as President and Founder of Telos Pharmaceuticals, a privately held biotech company in San Diego. While there, I put together a highly experienced management team and initiated programs in cancer, autoimmunity, allergy and asthma. Negotiations are currently being conducted to license the technology to a large pharmaceutical company.

04. In 2006, I founded a biotech company by the name of Adamis Pharmaceuticals where I serve as President and CEO. I have recently acquired a specialty pharmaceutical company and I am in the process of acquiring a drug packaging company. Both companies will be wholly owned subsidiaries of Adamis Pharmaceuticals. I intend to take Adamis Pharmaceuticals public by year-end or shortly thereafter. I have engaged Bill Driscoll to assist me in finding office and laboratory space for my new company.

05. I have served on the Board of Directors of various private and public companies and am named on twenty-three patents and have authored over 225 articles and abstracts in the field of Immunology. From 1987 to present, my work with many of these companies has required me to purchase, sell and lease substantial amounts of real property in San Diego County and elsewhere.

06. I have known Bill Driscoll, the plaintiff in this matter since 1987. Our relationship was professional in the beginning. Over the years it became both personal and professional in that I have developed a tremendous amount of respect for him,

not only as a very professional and knowledgeable real estate salesman, but also as a person.

07. Over the years, Bill Driscoll, as a commercial real estate salesman, working for CBRE or its predecessor helped me and my companies buy, sell or lease more than ten (10) major real estate transactions. I believe the first was over more than 15 year ago and involved the purchase of about 3.41 acres of property for approximately $900,000.00. The largest transaction involved the construction and lease of a building in Carlsbad for more than $7,500,000.00. In total, the commercial transactions brought to CBRE, because of Bill Driscoll, represent investments in excess of $30,000,000.00 and resulted in commissions being paid to CBRE in excess of $750,000.00.

08. Bill Driscoll also worked as a commercial real estate salesman on land deals/projects in Pennsylvania for a company of which I was CEO. It involved the lease of two commercial buildings with over 100,000 square feet of lab and office space.

09. Whenever I have used the services of Bill Driscoll, he has at all times demonstrated that he had more than the necessary knowledge and experience with commercial sales and leasing transactions in the Carlsbad area. His commitment to achieving my objectives was unquestionable.

10. Again, since the late 1980s as founder, President, and/or CEO of several biotech companies, I have repeatedly used Bill Driscoll as my corporate real estate advisor and commercial real estate salesman. Over the years, Bill Driscoll handled all aspects of our major real estate transactions, including purchase and sale of 30 acres of

commercial land. His commercial broker work, on behalf of CBRE, was always of the highest quality and his loyalty to us was exceptional.

11. For more than 15 years, over and over again, Bill Driscoll followed up for me on every issue and every transaction. He never let anything drop and did everything he said he was going to do. He was our go-to guy in the San Diego area. The work Bill Driscoll handled for us saved us millions of dollars and resulted in negotiated terms and conditions, always in our favor. At all times, Bill Driscoll's advice, guidance and professional assistance were informative, enlightening, and right on. Because of his work, we always knew we were making a fully informed decision before any transaction.

12. In October of 2003, I was invited by Bill Driscoll to have lunch with and meet Jeff Woolson and Mark Read. I understood the purpose of the meeting was for me to meet Mr. Woolson and Mr. Read, who I understood to be Bill Driscoll's supervisors, so that they might become acquainted with and understand my company, our potential commercial real estate needs, and the excellent work done by Bill Driscoll. I believe at that time we were looking to build or lease a 50,000 square foot facility in Carlsbad and a facility downtown on or near the waterfront. I remember the lunch as being initially pleasant on the surface. However, during lunch, neither Read nor Woolson seemed very interested in me or my activities.

13. Near the end of the lunch, Bill Driscoll excused himself to go to the bathroom. While Bill was gone, both Woolson and Read now appeared

very interested in my activities and my needs. During Bill Driscoll's absence they suggested that there were other brokers or salesmen with CBRE, including both of them, who had more expertise and experience than Bill. I do not remember their exact words, but I believed they were clearly trying to take my business away from Bill Driscoll and direct it to others in CBRE, including Woolson and Read. I do recall them saying that as regards my needs and plans they, Woolson and Read, were the ones I should be talking to and dealing with, not Bill Driscoll. I listened, said nothing, and was shocked.

14. After the lunch, I advised Bill Driscoll of this conversation and my surprise. I had never professionally encountered an event or conversation remotely similar to the one I had with Read and Woolson after Bill Driscoll excused himself. It was obvious they were trying to cut Bill Driscoll out of a potentially very large commission. They saw a potentially very big transaction and they clearly wanted to make sure they were part of it.

15. I understand that Woolson, Read and others have filed documents, under oath, which documents suggest that Bill Driscoll lacked the necessary level of knowledge and experience with commercial sales and leasing transactions in the Carlsbad/San Diego area. I am informed that Woolson, Read and others have filed documents, under oath, which documents suggest that Bill Driscoll was not a professional person experienced with business parks or landlords. For anyone to make such ridiculous and incorrect statements about Bill Driscoll, they would have to have not known him, be incompetent, be making it up, and/or

intentionally trying to divert business and income from Bill Driscoll.

16. For more than 20 years, I have worked with other professionals in the biotech industry, including professionals knowledgeable in private and public offerings intended to raise large sums of money. I have been personally and closely involved in raising more than One Billion dollars for companies having contacts with San Diego County. At all times, in my dealings with Bill Driscoll, I have been amazed by his background, professional experience and extensive knowledge of commercial real estate. That someone would not want him on their "team" seems unbelievable to me. However, it was clear from my one meeting with Woolson and Read, that they wanted Bill Driscoll's business and attempted to get my business from him by building themselves up while attempting to tear Bill Driscoll down.

17. I have always considered it a special privilege to work with Bill Driscoll. Loyalty, integrity, honesty, dedication, commitment, and service-before-self are characteristics that describe him and all his professional work for me.

I declare under penalty of perjury under the laws of California that the foregoing facts are true and correct to the best of my knowledge and that I executed this declaration in San Diego County, California on Oct. 1, 2007.

/s/ Dennis J. Carlo

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

WILLIAM DRISCOLL, an individual, Plaintiff, vs. CB RICHARD ELLIS, INC., a Delaware Corporation; MARK READ, an individual, JEFF WOOLSON, an individual, and WILLIAM CHILLINGWORTH; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, et al, Defendants.	Case No. GIC874160 DECLARATION OF BARBARA KILEY

I, Barbara Kiley, under penalty of perjury, declare and state:

01. I am competent to testify in the courts of California and make this declaration upon personal knowledge.

02. In 2006, I retired after working for Morgan Stanley for 39 years. For more than 30 years, I managed real estate owned and leased by Morgan Stanley, first all over the United States, and for the last 18 years all real estate west of the Mississippi River.

03. In 1978, I was promoted to Assistant Vice President and Lease Negotiator. In 1980, I was promoted to Vice President-Real Estate, and assigned corporate officer status with authority to negotiate and execute leases, purchase and sale agreements, and related documents. My duties included responsibility for managing and supervising over 8 million square feet of commercial real estate for Morgan Stanley in approximately 500 locations.

04. In 1985, I directly supervised the opening of 33 offices for Discover Card Services throughout the United States of America. In 1987, I was responsible for the sale and disposition of all Sears Savings Bank locations and properties including their corporate headquarters in Glendale, California.

05. From 1988 to 2006, I was First Vice President of Morgan Stanley. My primary job duties and responsibilities were site selection, leasing, sub leasing and property management, geographic market research, financial analysis, occupancy analysis, strategic planning and related real estate matters for Morgan Stanley's 300+ locations in the western half of the United States. During this time frame, at any one time, I was responsible for managing over 10 million square feet of commercial real estate. I would conservatively estimate that on an annual basis, commercial real estate brokers and their firms were paid between 3 million and 5 million dollars per year in commissions for real estate transactions involving Morgan Stanley transactions supervised by me.

06. I know plaintiff William Driscoll. I first met him in about 1988. While employed with

Morgan Stanley, for approximately eighteen years, I used Bill Driscoll's professional services, as a commercial real estate salesman, for more than 20 real estate projects in Southern California, including the Los Angeles area. I most recently used his services in 2004-2006, when he assisted in leasing space in the Carlsbad area.

07. During my professional relationship with Bill Driscoll he worked with more than six architects, numerous lawyers including the lead real estate lawyer for Morgan Stanley, and approximately twenty branch managers. On all real estate issues, the Morgan Stanley lawyers, and the branch managers were all supervised by me and answered to me.

08. During my long term professional relationship with Bill Driscoll, he was, at all times, extremely knowledgeable, unbelievably thorough and exceptionally prepared. This included every transaction from the first transaction to the last transaction. The first transaction was in about 1988. In that transaction he represented the landlord in negotiating a lease in the Carlsbad office with Morgan Stanley (then Dean Witter) as tenant. The last transaction was in 2004-2006. In the last transaction he represented Morgan Stanley, as tenant, in the lease of approximately 11,000 square feet of commercial real estate in the Carlsbad, California area.

09. I had so much faith in the work of Bill Driscoll that when Morgan Stanley had real estate transactions in the Los Angeles area and I used the brokerage services of CBRE, I insisted on using the services of Bill Driscoll.

10. During my 39 years working on commercial real estate transactions all over the United States I likely dealt with more than eighty commercial real estate brokers/sales persons, six, or more, commercial brokerage firms and many attorneys. From my personal experience with Bill Driscoll, I believe he was one of the top five commercial real estate salesmen I ever dealt with. I know from comment after comment that my opinion of Bill Driscoll was shared by all people at Morgan Stanley who worked with him, including architects, lawyers, and branch managers. Every single employee at Morgan Stanley, who had the opportunity to work with Bill Driscoll, had nothing but the highest praise for his work.

11. During part of my time with Morgan Stanley, I was required to use the services of CB brokers on all deals because Sears owned both Dean Witter (Morgan Stanley) and CB. During the last 20 years of work, I probably used more than 25 commercial real estate brokers from Coldwell Banker and later from defendant CBRE. After working with Bill Driscoll, he was the only CBRE salesman in the southern California area I would use. From my personal experience, Bill Driscoll's knowledge, experience, and professionalism were far above that of any other CBRE commercial broker or salesman.

12. One of his remarkable qualities, which I came to really appreciate about Bill Driscoll, was that the few times he said he was out of his comfort zone he quickly and seamlessly partnered with other professionals to provide a team approach to the problem and to quickly provide all the expertise

necessary to successfully complete the real estate transaction. Bill Driscoll, from the first transaction to the last transaction, knew how to get things done or who to turn to get the matter/transactions completed. There are very few salesmen who are more persistent and tenacious than Bill Driscoll.

13. In my last transaction with Bill Driscoll, I asked Bill to inquire of his supervisors about the CBRE fee schedule. The real estate matter was in the Carlsbad area and I wanted to use Bill Driscoll. However, other broker firms, had a fee schedule that was much more competitive. Because other firms were working with a commission fee schedule that was more competitive, I needed to know if CBRE would competitively adjust the charge for its services. Bill Driscoll was apparently not able to obtain an answer to my question from his superiors before I had to make a decision of what broker to use. However, because of my history with and trust in Bill Driscoll, I still used his services. When he could not tell me what the CBRE fee schedule would be for this or any other transaction he offered to take whatever Morgan Stanley thought was fair for his share of the commission. Bill Driscoll made it clear that any reduction in commission was to come from his share and not the share of CBRE. I wanted Bill Driscoll to be paid in full for his work with Morgan Stanley.

14. I understand that Mark Read has written that he assisted Bill Driscoll in getting his full commission from his 2005 work with Morgan Stanley. I have no knowledge of this. Before I ever met with or had lunch with Mark Read, Bill Driscoll's work on the last Carlsbad real estate

transaction for Morgan Stanley was completed and the parties to the transaction had already determined to pay a full commission so Bill Driscoll would be paid in full.

15. The commissions generated by CBRE for work performed by Bill Driscoll for Morgan Stanley/Dean Witter likely exceeded One Million Dollars ($1,000,000.00).

16. While Bill Driscoll's primary work with Morgan Stanley was assisting us in locating and leasing new spaces, relocating an existing office, or negotiating new leases, he also provided services when we need to sublease space and obviously worked with Morgan Stanley's landlords. Again, Bill Driscoll, while working for CBRE and while doing commercial broker work, as a representative of CBRE, for Morgan Stanley was diligent, conscientious, timely and intensely loyal. Repeatedly, his work for Morgan Stanley was outstanding and resulted in substantial economic savings to Morgan Stanley. From working with him on more than 20 transactions, I came to understand that Bill Driscoll was very knowledgeable in a broad range of commercial real estate matters, including the leasing, sale or disposition of corporate real estate.

I declare under penalty of perjury under the laws of California that the foregoing facts are true and correct to the best of my knowledge. I executed this declaration in San Francisco County, California on September 30, 2007.

/s/ Barbara Kiley

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

WILLIAM DRISCOLL, an individual, Plaintiff, vs. CB RICHARD ELLIS, INC., a Delaware Corporation; MARK READ, an individual, JEFF WOOLSON, an individual, and WILLIAM CHILLINGWORTH; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, et al, Defendants.	Case No. GIC874160 DECLARATION OF MARK READ

I, Mark Read, declare and state as follows:

1. I am Senior Managing Director at CB Richard Ellis ("CBRE") for the San Diego region.

2. I am over the age of eighteen and, if called as a witness, I would and could competently testify thereto to all facts in this declaration within my personal knowledge except where stated upon information and belief.

3. I have worked at CBRE for 23 years, and I have held my current position as Senior Managing Director since 1998. In this position, I am

responsible for the San Diego Region, and in particular, for overseeing four CBRE offices in that region, all business lines in that region, and a staff of 210 people. I work out of CBRE's La Jolla office location.

4. I do not possess authority to set company-wide policy for CBRE.

5. I have known Bill Driscoll for many years. Before Bill left his job with CBRE, he reported to Jeff Woolson who, in turn, reported to me.

6. I have never said or done anything with the intention to harm Bill or cause him any emotional distress. To the contrary, I have tried to be supportive of Bill.

7. Generally speaking, apart from the Bressi Ranch deal that closed in 2004, Bill's job performance in the last four or five years of his employment with CBRE declined in terms of his revenue production. I continued to work with him and support him through this time in the hopes that his performance would pick up, particularly since he had been with CBRE for so long and because I expected that at same point his military background and connections would enable him to secure substantial commercial real estate deals for CBRE.

Bill Driscoll's Application for Disability Benefits

8. In the fall of 2002, I reviewed a letter and questionnaire related to Bill Driscoll that came to CBRE from an insurance carrier, UNUMProvident. Based on my review, it was my understanding that he was applying for disability benefits, and that he had authorized CBRE to release certain information

regarding his employment and income to the insurance carrier in connection with that application. As such, I completed and returned the questionnaire as requested by the carrier. See Exhibits A and B, showing true and accurate copies of the letter and questionnaire, and the signed authorization. I did not learn of any specific health condition from the paperwork. I had no other contact with the insurance carrier, UNUMProvident, regarding Bill, and provided no other information to UNUMProvident.

9. Based on my review of these insurance papers, I concluded that Bill was experiencing some kind of health problem. For this reason, I met with him to express my support for him, and I said that I was sorry to hear he had a "medical condition." Bill volunteered that he had been diagnosed with post-traumatic stress disorder. In response, I offered him the opportunity to take time off of work, even up to six months if he wanted. He rejected my offer to take time off and said nothing about any changes that be wanted CBRE to make to his job or schedule. I mentioned that I doubted that he would be eligible for disability benefits because he was still working as usual, but he did not reply.

10. Aside from offering Bill some time off from work in that meeting, I never took any actions or made any decisions regarding the terms or conditions of Bill's employment because of his PTSD or any other alleged disability. In short, Bill's health condition was a non-issue for me after our meeting about it.

11. Bill did not request any schedule or job changes or other kind of accommodation.

If Bill thought that I or anyone at CBRE was treating him differently or unfairly because of any health issue, he never mentioned that to me or anyone else at CBRE as far as I know. To my knowledge, Bill did not complain about any alleged discrimination or harassment based on disability to any CBRE personnel during his employment.

12. After the phone call about the disability insurance issue, I did not discuss any health condition of Bill during his employment with anyone inside CBRE, including Jeff Woolson or William Chillingworth, nor with anyone outside of CBRE, including CBRE client Sares-Regis Group, UNUMProvident or anyone else. Aside from this meeting with Bill, during his employment, I never heard of any comments or remarks made by or about Bill relating to any health condition of his. To my recollection, the next time that I heard anything more concerning Bill's condition was in early March 2006 when I received his resignation letter, which I discussed only within CBRE and only to the extent that other CBRE personnel needed to know for administrative and work- related reasons. As such, to the extent that I have been involved in any discussions or communications regarding Bill's alleged disability, they have only been in the context of defending myself and CBRE in this lawsuit.

Bressi Ranch Re-Marketing Team

13. In 2002, MetLife Insurance Company hired CBRE to sell its 132-acre parcel of largely undeveloped commercial real estate called Bressi Ranch, located in Carlsbad, San Diego County,

California. CBRE brokers Matt Strockis and Rick Sparks marketed the property on behalf of MetLife.

14. The Sares-Regis Group is a commercial and residential real estate development and management firm. For years, Sares-Regis had been a very important client of CBRE, and my Company did extensive business with the group in many other markets.

15. In 2003, Bill Driscoll presented the Bressi Ranch listing to Sares-Regis senior executives John Hagestad and Peter Rooney, both of whom expressed a strong interest in buying, subdividing, and re-marketing the property. Bill was paid approximately $300,000 by Sares-Regis for his part of the Bressi Ranch sale, when it closed escrow.

16. After Sares-Regis was identified as the purchaser and the Bressi Ranch property was in escrow, Bill Driscoll joined CBRE brokers Matt Strockis and Rick Sparks and the three commenced the pre-listing work on behalf of Sares-Regis for re-marketing the land to developers and other industrial/office users.

17. Later, during the approximate one-year long Bressi Ranch escrow period, I learned from Sares-Regis's John Hagestad, Peter Rooney and Bruce Bearer, that they lacked confidence in CBRE's re-marketing team for the Bressi Ranch listing. While they were complimentary of Bill's Bressi Ranch work in representing them as buyers, I learned that CBRE's opportunity to list the property for future resale and development was in jeopardy. Specifically, Sares-Regis told me that they did not want Bill Driscoll on the re-marketing team because he lacked the level of knowledge and experience with

sales and leasing transactions that they required. Also, they complained that Bill's business primarily consisted of representing tenants. For re-marketing sub-divided lots of Bressi Ranch, they required brokers with experience working with business parks and representing landlords. Finally, I learned that John Hagestad and Peter Rooney wanted a broker who had the latest comparable information with regard to leases and sales in order to understand the economics of the market and how land was to be priced. For this reason, they wanted a broker with involvement in comparable lease or sale transactions in the local market in order to substantiate that the price of Bressi Ranch land was correct for the local market. They told me that Bill lacked this requisite knowledge and experience, and had failed to provide even basic details related to previous transactions when they asked him. Likewise, Sares-Regis was not particularly impressed with Matt Strockis, who they would allow to remain on the team but only in a limited role. Overall, Sares-Regis reported that CBRE's team lacked a "super star" in the Carlsbad market and CBRE would now have to compete with other brokerage firms for the Bressi Ranch listing and participate in a listing presentation.

18. As Managing Director for the San Diego region, I was concerned about the information I learned in our meeting with Sares-Regis. Jeff Woolson and I returned and immediately met with Bill Driscoll to communicate to him the difficult news - that we had just met with the client, and the Sares-Regis management team preferred that he not participate on the re-marketing team. Bill indicated

that he was going to go meet with Sares-Regis to discuss this matter. It is my understanding that after that meeting, Sares-Regis authorized a very limited role for Bill on the re-marketing team restricted to pursuing corporate users for build-to-suit opportunities.

19. After these meetings with Sares-Regis, Rick Sparks, Jeff Woolson, Bill Chillingworth and I brainstormed. We decided to try to recruit former CBRE broker Lannie Allee back to the company due to his extensive experience selling land in Carlsbad. We were successful in doing so, and Lannie and his business partner, Roger Carlson, joined CBRE in September 2003. They joined the Bressi Ranch team for the listing presentation, including Rick Sparks, with Matt Strockis and Bill Driscoll, in limited roles.

20. Our reconstituted re-marketing team was successful, as CBRE won the Bressi Ranch listing. In the years after, we succeeded in selling off all available land from the Bressi Ranch listing. Bill, however, failed to produce any build-to-suit clients for the listing.

Titan Corporation (now L3) Broker Representation

21. Before 2003, Insignia/ESG, Inc. ("Insignia"), a commercial real estate company and long-time competitor of CBRE, had a contract with client Titan Systems ("Titan") to provide lease administration, transaction management, and brokerage services for Titan. In particular, Los-Angeles-based Insignia broker Mark Sprague led a team that managed the Titan account and was responsible for selecting brokers to perform

acquisition/disposition assignments on behalf of Titan in various cities nationwide.

22. I recall Bill trying to secure business from Titan before 2003, apparently because of a military connection with a Titan representative. I supported Bill in these efforts and was prepared to assign him to the account if CBRE landed it, and if Bill's involvement was something the client approved of.

23. In 2003, CBRE acquired Insignia, thus inheriting its Titan account and Mark Sprague and his team, whose roles under the Titan contract continued unchanged with CBRE. As such, Mark Sprague's team continued engaging local brokers across the country to represent Titan in commercial real estate transactions. With Mark Sprague and his team already working on the Titan account, no additional permanent CBRE brokers in San Diego were needed. Indeed, even San Diego CBRE broker Jerry Keeney, who Mark Sprague's team appointed to help on one Titan assignment, was not added as a permanent Titan account broker.

Morgan Stanley

24. Bill Driscoll worked on various assignments with Morgan Stanley while he was at CBRE. Overall, however, Morgan Stanley did not provide significant work to CBRE. On several occasions I met Bill's primary Morgan Stanley contact, Barbara Kiley, Vice President of Real Estate. Ms. Kiley informed Bill and I that The Staubach Company handled the vast majority of Morgan Stanley's commercial real estate business throughout the country. Because of the national scope of the Morgan Stanley account, The Staubach

Company had granted a significantly reduced fee arrangement to Morgan Stanley.

25. In late 2004, Bill Driscoll raised with me the possibility of representing Morgan Stanley in its search for new office space in the Carlsbad market. Bill sought approval from me of a 50% reduction of our commission fee schedule, based on the fact that Morgan Stanley enjoyed this kind of significantly-reduced fee arrangement with The Staubach Company. This discount was a precondition to Bill obtaining the assignment from Ms. Kiley. I advised Bill that I would need to forward his request to Mitchell Rudin, a senior manager in our New York office.

26. Also, in October 2004, Mr. Rudin, who was in fact the President of CBRE's Tri-State Region with oversight for all of CBRE's operating and business functions in New York City, advised Bill directly of CBRE's policy not to allow substantial discounts like the one Bill proposed, when the client at issue is not a national account and no compelling reason existed to make an exception. I was copied on the email chain in which Mitch communicated this policy, a true and accurate copy of which is attached at Exhibit C.

27. Despite the denial of Bill's request, I nevertheless tried to assist him on the Carlsbad account by authorizing a trip and flying with him to San Francisco to attend his meeting with Ms Kiley.

28. Bill offered Ms. Kiley cost savings by suggesting that he cut his own personal commission in exchange for her awarding him the assignment. She refused his offer but gave him the Carlsbad assignment anyway. Bill was able to collect

approximately $122,000 in gross commission on the deal - which was twice the amount he would have been paid if CBRE had approved the discount. Bill ended up actually benefiting from CBRE's refusal to negotiate its fee on this one-off deal.

Commission Split on new CBRE Office Space

29. Sometime in 2004, CBRE commenced a search for new, larger office space in Carlsbad due to the growth of that office. Jeff Woolson and I assigned Bill Driscoll and Gary Williams the work of subleasing our old space located at 5740 Fleet Street, and they agreed that they would share the full landlord representation fee for subleasing the old space, but share only 2% of the 4% tenant representation fee related to leasing the new office space so that CBRE could use the remaining 2% fee for tenant improvement funds.

30. Later, after the papers were signed and the deal for the new office space was closed, Jeff Woolson informed me that Bill and Gary wanted us to disregard the 2% tenant representation fee that they had agreed to, and pay them the full 4% fee. I discussed this request with Jeff Woolson and we decided to stick with the original agreement earmarking half of the 4% fee for tenant improvement funds because that is how CBRE had done it on previous deals.

31. With regard to the old CBRE office space, Bill and Gary were paid the full landlord side of the fee once they closed the deal subleasing the old space.

Dr. Carlo

32. Over the years, I have met Dr. Dennis Carlo, with whom Bill Driscoll worked in various real estate deals. I recall on one occasion having a business lunch with Bill, Dr. Carlo, and Jeff Woolson, and having at least two other, separate lunches one-on-one with Dr. Carlo. In all of my conversations with Dr. Carlo, I have never suggested replacing Bill on his accounts. Nor have I heard Jeff Woolson suggest such a replacement.

Base Realignment and Closure Project (BRAC)

33. In 2005, Bill Driscoll came to me to discuss the Navy Base Realignment and Closure project, or "BRAC," and his interest in trying to get CBRE to represent the military in its efforts to sell obsolete and excess real estate.

34. Because of his military connections, I hoped that he might help win the BRAC business, I supported Bill in his attempt to build a team and pursue this business, and authorized various resources to help him get this account. For example, I participated in numerous conference calls with Standard & Poor's representatives who were members of the team Bill was assembling. Also, Bill flew out and attended a three-day conference in Colorado for BRAC contractors, and CBRE paid for all of his expenses and those of CBRE's top marketing officer, James McCarthy, who went along to assist in Bill's efforts to land this work. Even more, I obliged Bill's request and agreed, in writing, that if CBRE won the contract due to Bill's efforts, he would be assigned a leadership role on the team. However, CBRE did not win the contract.

35. During this time, I recall that there was controversy within higher levels of CBRE regarding the profitability and strategy involved in pursuing the BRAC business. In particular, I participated in numerous conference calls and discussions with my colleagues in the Washington, D.C. office, where CBRE's government contracting expertise is concentrated, who recommended abandoning pursuit of the BRAC disposition process. I continued to support Bill's BRAC efforts despite their concerns that CBRE could be barred from later representing buyers of the BRAC sites in future acquisitions of these BRAC properties – which was where they had determined CBRE's greater opportunity existed. Also, I participated in discussions in which there was debate about whether the Navy would perceive a conflict of interest if CBRE represented both the Navy as a seller and also prospective buyers and developers of the site.

36. CBRE's Washington, D.C. office's broker team eventually chose the members of the BRAC team, identifying Bill in an advisory title rather than the leadership role that he wanted. This interim designation proved inconsequential: CBRE lost out on the contract to Booz Allen, leaving no BRAC team for Bill to lead.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 31 day of July, 2007, at Newport Beach, California.

/s/ Mark Read

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

WILLIAM DRISCOLL, an individual, Plaintiff, vs. CB RICHARD ELLIS, INC., a Delaware Corporation; MARK READ, an individual, JEFF WOOLSON, an individual, and WILLIAM CHILLINGWORTH; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, et al, Defendants.	Case No. GIC874160 FIFTH DECLARATION OF DOUGLAS R. SHEPHERD REGARDING THE DEPOSITIONS OF MARK READ

I, Douglas R. Shepherd, declare under penalty of perjury under the laws of California, as follows:

01. I am one of the attorneys for plaintiff in the above-captioned matter, am competent to testify, and make this declaration upon personal knowledge.

02. On September 18, 2007, I took the first deposition of Mark Read in San Diego County, California. On September 19, 2007, I took the second deposition of Mark Read in San Diego County, California. At those depositions, the following questions were asked and answers given:

Q. Is there anyplace in the records of CB Richard Ellis where you could go back and refresh your memory on that as to whether or not when Mr. Allee and Mr. Driscoll were working in the same office, who was the top producer the most times?

A. Since I've been in my job as the regional manager, we've recognized salespeople on a regional level and not office by office. And since approximately 1996 and Bill Driscoll was never a top producer in that context. Lannie Allee has been several times, but I don't recall the exact number.

Q. He came back to work in 2003, right?

A. About then, yes.

Q. Was he in the Carlsbad office in 2004?

A. Lannie?

Q. Yeah.

A. Yes.

Q. Was Mr. Driscoll in the Carlsbad office in 2004?

A. Yes.

Q. Who was the top producer in the Carlsbad office in 2004?

A. Bill Driscoll.

Q. How would you describe your professional -- what would you describe your profession as?

A. Senior Managing Director, San Diego Region, CB Richard Ellis.

Q. In the present position, 2007, how many employees do you supervise or have responsibility for?

A. Approximately 225.

Q. In June of 2003, how many employees did you have responsibility for supervising?

A. I don't know.

Q. Was it likely more than 200 or less than 200?

A. It was probably about 200.

. . . . [Pages 16-18]

Q. Do you remember answering a series of questions for UNUM Provident in about early 2003?

A. Yes.

Q. Do you remember being asked what Mr. Driscoll's job duties and responsibilities were in the Carlsbad office?

A. I remember the questionnaire they sent me.

Q. Did you attempt to answer it truthfully at the time that you filled it out?

A. Yes.

Q. Do you know if you represented to UNUMProvident that Mr. Driscoll's responsibilities were tenant representation or office and industrial land sales and leasing?

A. I don't recall.

Q. Would you need to review the document to refresh your memory?

A. Yes.

Q. As you testify here today under oath, his primary responsibilities in 2003 were not office and industrial land sales and leasing; is that correct?

A. Correct.

. . . . [Pages 20-21]

Q. Presently, of the two hundred and -- approximately 225 employees that you supervise in the San Diego area, how many of them are women?

A. I don't know offhand.

Q. Approximately, if you know.

A. I don't want to guess.

Q. So you don't know?

A. I don't know.

Q. Presently, of the 225 employees in the San Diego area, how many of them are employees of color?

MS. DOLLARHIDE: Objection. Relevance. This is neither a gender, nor a race discrimination case. It's a case about disability and post-traumatic stress disorder. Nor is it a case about who assaulted whose brother or who else had military experience. Let's move on.

BY MR. SHEPHERD:

Q. You can go ahead and answer.

A. Could you repeat the question?

Q. How many employees are employees of color?

MS. DOLLARHIDE: Same objection.

THE WITNESS: I don't know.

BY MR. SHEPHERD:

Q. Okay. How many of them are you supervising presently have an identifiable disability?

MS. DOLLARHIDE: Vague and ambiguous as to "identifiable disability."

You can respond.

MS. WEISHART: Join.

THE WITNESS: I don't know.

BY MR. SHEPHERD:

Q. Do you know if any of them have an identifiable disability presently?

MS. DOLLARHIDE: Same objection.

Go ahead.

THE WITNESS: I don't know.

. . . . [Pages 23-24]

Q. Who in the HR department in 2003 would be the person that you would talk to as regards addressing a concern you might have about a disabled employee? Who would you contact in the HR department?

MS. DOLLARHIDE: Objection. Lacks foundation.

You can respond.

BY MR. SHEPHERD:

Q. You can go ahead and answer, if you understand.

A. Probably Wally Rosvall.

Q. The attorney?

A. Yes.

Q. And did you get some training that would indicate that if you needed to deal with an employee regarding a disability accommodation, that the person to contact would be Wally Rosvall?

Did you get some training or is that just an instinct that you're --

A. Could you rephrase the question?

Q. Sure. That's a bad question.

Is Wally Rosvall in the HR department or is he in the legal department?

A. He's in the legal department.

Q. Okay. Did you have an HR department in 2003?

A. Yes.

Q. Who was the head of the HR department in 200- --

A. I don't recall.

. . . . [Pages 25-26]

Q. Early 2003, you filled out a form for UNUM Provident; is that correct?

A. Yes.

Q. Before you filled out that form, did you talk to anybody by telephone at UNUM Provident?

A. I don't recall.

Q. Is it possible that you did?

A. Yes.

MS. WEISHART: Calls for speculation. Move to strike for the purposes of inserting my objection.

BY MR. SHEPHERD:

Q. And did you take any notes of that conversation, if you had one?

MS. DOLLARHIDE: Objection. Lacks foundation.

MS. WEISHART: Join.

BY MR. SHEPHERD:

Q. Did you take any notes?

A. No.

. . .

Q. I'll hand you what has been marked as Exhibit Number 44 for the purposes of this deposition and ask you if you've seen this document before.

MS. WEISHART: Object only to the extent that I don't believe it's a complete document. It may be somewhat confusing or misleading.

MS. DOLLARHIDE: Same objection. I don't see a Bate stamp. Was this document produced?

MR. SHEPHERD: This document was produced by UNUM Provident. I don't think they Bate stamped the documents that they produced. Okay?

. . .

BY MR. SHEPHERD:

Q. Have you seen this document before?

MS. WEISHART: Same objection.

BY MR. SHEPHERD:

Q. Have you seen the document before?

A. No, I have not.

Q. Second-to-last paragraph, it says, "In my telephone conversation with Mr. Read..."

Do you see that?

A. Yes.

Q. Continues to say, "...I did not inform him of everything we would be talking about, but instead opted to share with him only a few of the topics we would be discussing and mentioned that I had some other general questions as well."

Do you see that?

A. Yes.

Q. Does that refresh your memory as to whether or not you might have talked to somebody in UNUM Provident about Mr. Driscoll in early 2003?

A. No.

Q. Is it fair to say that presently you have no recollection of that conversation that occurred?

Is that correct?

A. That's correct.

Q. And you have no notes of such a conversation, if it occurred, correct?

A. Correct.

Q. Would you be able to go back someplace in your records and refresh your memory or search your computer or notes and files or calendar to see if, in fact, such a conversation occurred?

Between now and the time of trial, would you be able to go someplace and look?

A. No.

Q. So it's not likely you could go back and review any document to refresh your memory on whether or not you had a conversation with UNUM Provident; is that correct?

A. I'm not sure I understand your question.

Q. That's fair.

Do you know of anyplace you could go between now and the time of trial to look at a document to refresh your memory as to whether or not you had a telephone conversation with UNUM Provident in late 2002 or early 2003?

A. No.

. . . . [Pages 27-31]

Q. Do you know who you referred it to in the HR department?

A. I'm not sure.

Q. Did you talk to anyone in the HR department about the questionnaire from UNUM Provident?

A. I don't recall.

Q. Would you have taken any notes or recorded recollections of this conversation, if it occurred?

A. I don't recall.

Q. Do you think there is anyplace you could go between now and the time of trial in this case to refresh your memory as to whether you talked to anybody in the HR department?

A. No.

. . . . [Page 32]

Q. In your work with CB Commercial and/or CB Richard Ellis, have you supervised any other employee who has been diagnosed with PTSD?

MS. DOLLARHIDE: Objection. Calls for speculation.

MR. SHEPHERD:

Q. You can go ahead and answer.

A. Not that I know of.

Q. So as we sit here today, what is your understanding of PTSD or post-traumatic stress disorder?

MS. DOLLARHIDE: Objection. Calls for a medical conclusion and competence.

BY MR. SHEPHERD:

Q. You can go ahead and answer.

A. I don't know.

. . . . [Page 33]

Q. In being involved in this litigation, your efforts and your actions leading up to this deposition, have you reviewed any document between you and Mr. Driscoll concerning Mr. Driscoll's disability claim and/or his medical condition of PTSD? Have you seen a document between you and Mr. Driscoll?

A. I saw the release that Mr. Driscoll signed for the UNUM questionnaire.

Q. Was that a communication between you and Mr. Driscoll?

A. No.

Q. Okay. Did you see any documents which could be classified as a communication between you and Mr. Driscoll regarding his disability claim and/or his medical condition of PTSD?

A. Not that I recall.

. . . . [Page 35]

BY MR. SHEPHERD:

Q. What, if any, document did you review or communication did you review after you sent the information back to UNUM Provident about the medical condition of PTSD?

A. None.

Q. What, if anything, did you request from Mr. Driscoll as regards his disability claim

withUNUM Provident or his medical condition of PTSD?

A. Could you repeat the question?

Q. What, if any, documents did you request from Mr. Driscoll as regards his disability claim?

A. None.

Q. What, if any, questions did you ask Mr. Driscoll as regards his disability claim?

A. "How can you file a disability claim if you are still working full time?"

Q. And why did you ask that question?

A. Because I didn't understand what he was trying to do.

. . . . [Page 37]

Q. Prior to early 2003, had you ever assisted any employee you were supervising in filing for a disability claim?

A. Not that I know of.

Q. So I don't want to make this any briefer than it is. Your background and experience with disability claims was one that you might have made following knee surgery 21 years ago; is that correct?

A. Correct.

Q. Anything else?

A. In what context?

Q. Training, background, experience on disability claims.

A. No.

Q. So you asked Mr. Driscoll, you claim, "How can you file a disability claim when you're working full time?"

A. Correct.

Q. So you knew that he was attempting to work full time?

A. Yes.

Q. Anything else that you said to Mr. Driscoll at that time?

A. I offered that if he needed time off, that I would support him. He could take time off, if he needed it.

Q. Did he ask for time off?

A. No. He said he was going to fight through it and continue to work and not let it get him down.

Q. Anything else said?

A. No.

Q. How many conversations did you have with Mr. Driscoll as regards his disability?

A. I remember one in person. I don't recall others.

. . . . [Pages 39-40]

Q. Do you recall receiving any documents from Sares-Regis which stated, suggested or alleged that Mr. Driscoll was not conversant with the details of transactions involving Sares-Regis?

A. No.

Q. Do you recall receiving a phone call from anybody in Sares-Regis that stated, suggested or alleged that plaintiff Driscoll was not conversant with the details of transactions involving Sares-Regis?

A. No.

Q. Let's look at Document Request Number 4. It says, "All documents dated between January 1, 2003 and January 1, 2005 from anyone at Sares-Regis which states, suggests or alleges that information provided or statements made by Plaintiff Driscoll demonstrated that Plaintiff Driscoll lacked sufficient knowledge regarding the marketplace," close quote.

Do you see that?

A. I do.

Q. Do you recall, as you sit here today, ever receiving a document from anyone at Sares-Regis which stated, suggested or alleged that information provided or statements made by plaintiff Driscoll demonstrated that plaintiff Driscoll lacked sufficient knowledge regarding the marketplace?

A. No.

Q. Did you ever have any telephone conversation with anyone at Sares-Regis where that person stated, suggested or alleged that information provided or statements made by plaintiff Driscoll demonstrated that plaintiff Driscoll lacked sufficient knowledge regarding the marketplace?

A. I don't recall.

. . . . [Pages 61-62]

Q. It reads: "All documents dated January 1, 2003 and January 1, 2005 from anyone at Sares-Regis" -- excuse me -- "which state, suggest or allege that Information or statements made by Plaintiff Driscoll demonstrated that he failed to adequately answer Sares-Regis's questions regarding sales and

leasing transactions during its due diligence period," close quote.

Did I read that correct?

A. (No audible response.)

Q. Did I read that correct?

A. Yes.

Q. As you sit here today, you remember reviewing any document from anyone at Sares-Regis which stated, suggested or alleged that information or statements made by plaintiff Driscoll demonstrated that he had failed to adequately answer Sares-Regis's questions regarding sales and leasing transactions during its due diligence period?

A. No.

Q. As we sit here today, do you remember having any telephone conversations before this litigation began and you employed conversation -- counsel from anyone at Sares-Regis -- telephone conversation with anyone at Sares-Regis which stated, suggested or alleged that information or statements made by Bill Driscoll demonstrated that he had failed to adequately answer Sares-Regis's questions regarding sales and leasing transactions during its due diligence period? A. No.

. . . . [Pages 63-64]

BY MR. SHEPHERD:

Q. Would you look at Question Number 2, "Job duties." It says, does it not, "Mr. Driscoll is a fully commissioned salesperson for CB Richard Ellis, Inc. He negotiates sale and lease transactions for his clients. He does not have any direct reports," correct?

A. Correct.

Q. Was that correct? He negotiates sale and lease transactions for his clients?

A. Yes.

Q. Were his clients office/industrial clients?

A. Yes. Tenants.

Q. Tenants sell land?

A. Sometimes.

Q. What land do they sell? What land does tenants sell?

A. Major corporations own land all over the United States. They lease space. They acquire. They dispose of space. They sell buildings. They buy buildings.

Q. Do you see Question Number 6? "Over the past years, were there any significant changes noted in the following areas of Mr. Driscoll's job performance."

Do you see that?

A. Yes.

Q. "(A) Ability to complete job tasks and responsibilities reasonable and on time."

Did you answer "No" to that question?

A. Yes.

Q. Did you get that answer from HR or did you get that answer from your own observations of his work?

A. That would be my own observations.

Q. Then was the question, "Maintaining a reasonable relationship with other employees, assistants and supervisors."

Did you answer "No"?

A. Yes.

Q. Did you get that answer from HR or was that your own answer?

A. That was my answer.

Q. And was that from your observations of Mr. Driscoll?

A. Yes.

. . . . [Pages 66-67]

Q. Line 13. "All documents dated between January 1, 2003 and January 1, 2005 from anyone at Sares-Regis which demonstrated that Plaintiff Driscoll lacks sufficient knowledge regarding the marketplace."

Did I read that correctly?

A. Yes.

Q. As you sit here today, do you remember reviewing any document from Sares-Regis or anyone at Sares-Regis which claimed or alleged that Bill Driscoll had demonstrated a lack of sufficient knowledge regarding the marketplace?

A. No.

Q. As you sit here today, prior to this litigation beginning, do you remember having any telephone conversations with anyone at Sares-Regis where the Sares-Regis person suggested that Mr. Driscoll had demonstrated that he lacked sufficient knowledge regarding the marketplace?

A. No.

Q. The marketplace was Carlsbad; is that correct?

A. Yes.

Q. Mr. Driscoll had worked in 2003 for how many years in the Carlsbad marketplace?

A. I believe 22.

Q. I think you said in one of your declarations that Sares-Regis previous to the Bressi Ranch purchase was an important client of CB Richard Ellis; is that correct?

A. Correct.

Q. Who was it in the employment of CB Richard Ellis that showed the initiative to go out and actually contact Sares-Regis and get them interested in purchasing Bressi Ranch?

A. Bill Driscoll.

Q. Did you give him that assignment or did he do it on his own?

A. He did it on his own.

. . . . [Pages 69-71]

The salesperson that took Sares-Regis this new opportunity was Mr. Driscoll, correct?

A. Correct.

. . . . [Page 73]

Q. Didn't Mr. Driscoll do a good job for Sares-Regis in the purchase of Bressi Ranch?

A. He did.

Q. Did they have some bad experiences with other CB Richard Ellis brokers, salespersons there?

A. Not that I know of.

. . . . [Page 89]

Q. That's not the question.

The question is, did you think he lacked the information or experience to handle the assignment?

A. Yes.

Q. And did you tell them that?

A. I don't recall.

. . . . [Page 92]

Q. Mr. Driscoll's most recent experience was handling by himself a major transaction for a buyer, correct?

A. Correct.

Q. So his most recent experience was a large land sale, correct?

A. Correct.

MS. DOLLARHIDE: Objection. Mischaracterizes the testimony. It was on the buy side.

MR. SHEPHERD: I understand that. It was on the buy side.

THE WITNESS: Right.

. . . . [Pages 107-108]

Q. Second sentence says, "Bill was paid approximately 300,000 by Sares-Regis for his part of the Bressi Ranch sale when it closed escrow."

Do you see that?

A. Yes.

Q. "Bill" meaning Bill Driscoll, right?

A. Correct.

Q. Was that statement true and correct when you signed it?

A. Yes.

Q. Is it true and correct today, as you sit here?

A. I would clarify that they paid $300,000 gross to CB Richard Ellis, and we, you know, had our normal split with Bill Driscoll.

Q. Now it's not correct, is it? The statement is not correct, is it?

A. Well, it's incomplete.

Q. It's not correct. Bill was not paid $300,000 by Sares-Regis, was he?

A. No.

. . . . [Page 114]

Q. Okay. Have you ever signed a declaration under oath before?

A. Not that I recall.

Q. Did you understand this was under oath when you signed it?

A. Yes.

Q. Okay. You know in the industry the broker is paid a fee, correct?

A. Correct.

Q. So Sares-Regis was paid or paid CB Richard Ellis $300,000 for the work done by Bill Driscoll, correct?

A. Correct.

Q. And then CB Richard Ellis paid Bill Driscoll $150,000 of that, correct?

A. Correct.

Q. So Bill was paid by CB Richard Ellis $150,000 for the Bressi Ranch transaction, correct?

A. Correct.

Q. Are there any other statements in your declaration that are not correct at this time?

A. Not that I know.

. . . . [Page 115]

BY MR. SHEPHERD:

Q. Would you look at Page 7 of your declaration, which is Exhibit Number 51, Line 18. Remember before lunch when I asked you if there was anything else in your declaration that was incorrect?

A. Yeah.

Q. Would you look at Line 18 where it starts "Bill was able to collect approximately $122,000 in gross commissions on the deal."

A. Yes.

Q. The fact is the commission went to CB Richard Ellis just like the Sares-Regis header; isn't that correct?

A. Could you rephrase your question?

Q. Commission check went -- the 122,000 plus commission check went to CB Richard Ellis, didn't it?

A. Yes.

. . . . [Pages 194-195]

VOL. II

FURTHER EXAMINATION

BY MR. SHEPHERD:

Q. Do you have Exhibit No. 73 in front of you?

A. I do.

Q. Do you have Exhibit No. 51 in front of you?

A. I do.

Q. When we started the deposition yesterday morning, I told you that if you gave an answer to my question, I thought that you would know the question or understand the question, know the answer and be answering truthfully.

Do you remember?

A. Yes.

Q. And you thought that was fair, right?

A. Yes.

Q. Before you filled out your declaration, did anybody tell you the importance of making sure that if you wrote something down under oath, that it would be correct?

A. I'm sorry, what was the --

Q. Before you signed your declaration, did anybody tell you the importance of making sure that what you put in your declaration was correct?

MS. DOLLARHIDE: Objection to the extent that it would call for you to reveal privileged attorney-client communication; otherwise, you can respond.

BY MR. SHEPHERD:

Q. I don't want to ask you who did it. I want to ask you if anybody told you the importance of making sure what you put under oath in your declaration was correct.

MS. DOLLARHIDE: Same objection. You're not to reveal any communications that you had with counsel; otherwise, you can respond.

BY MR. SHEPHERD:

Q. Go ahead and answer.

A. Could you repeat the question?

Q. Did anybody tell you how important it was to make sure that what you put under oath in your declaration was correct?

MS. DOLLARHIDE: You can respond to the question with a yes or no answer.

THE WITNESS: Yes.

BY MR. SHEPHERD:

Q. Did you understand that it was important to make sure that it was correct?

A. Yes.

Q. Would you turn to Page 2 of your declaration, Paragraph 8. Are you there?

A. Yes.

Q. Would you read Paragraph 8 to yourself. Sir, are you looking at other documents besides Paragraph 8?

A. I was looking at Exhibit A that went with that Exhibit A and B which go in Paragraph 8, correct.

Q. Have you read Paragraph 8 to yourself?

A. Yes.

MS. DOLLARHIDE: Feel free to look at the other documents if you need to.

MR. SHEPHERD: Excuse me.

MS. DOLLARHIDE: You asked him to look at Paragraph 8.

BY MR. SHEPHERD:

Q. Would you now look at the exhibits that go with it.

A. Okay. Yes, I have.

Q. Have you looked at them?

A. Yes.

Q. Would you please read aloud for the record Paragraph No. 8?

A. "In the fall of 2002, I reviewed a letter and questionnaire related to Bill Driscoll that came to CB from an insurance carrier" --

Q. Excuse me, CBRE. Read it accurately.

A. -- "CBRE from an insurance carrier UNUM Provident. Based on my review it was my understanding that he was applying for disability benefits and that he had authorized CBRE to release certain information regarding his employment and income to the insurance carrier in connection with that application.

"As such, I completed and returned the questionnaire as requested by the carrier (See Exhibits A and B showing true and accurate copies of the letter and questionnaire and the signed authorization.)

"I did not learn of any specific health conditions from the paperwork. I had no other contact with the insurance carrier UNUMProvident regarding Bill and provided no other information to UNUMProvident."

Q. Would you please read into the record what the Appendix A and B are, the date of them?

A. Okay. Exhibit A is a UNUM questionnaire. I don't see a date on it.

Q. Exhibit A is a fax communication from UNUM Provident on the first page to your secretary dated November 18th of 2002, is it not?

MS. DOLLARHIDE: Don't speculate.

THE WITNESS: Well, hang on.

Okay. Yeah, I was halfway through Exhibit A.

Excuse me.

BY MR. SHEPHERD:

Q. Has a date of November 18 of 2002, correct?

A. That's correct.

Q. Okay. Would you please tell the record what Exhibit B is.

A. Exhibit B is a Claimant's Supplemental Statement Claimant's Authorization from UNUMProvident.

Q. Now, you remember testifying yesterday that you don't believe you saw that?

A. That's correct.

Q. Okay. Now, would you look at Exhibit No. 73.

We just received from UNUMProvident here today in this deposition a document marked Exhibit No. 73, correct?

A. Correct.

Q. Is that your signature on the last page of that exhibit?

A. Yes.

Q. Did you sign that on November 4th of 2005?

A. Yes.

Q. Is your statement on Paragraph 8 of your declaration incorrect?

A. Apparently it is.

Q. Sir, how many statements in your declaration are incorrect?

MS. WEISHART: Objection; argumentative. And I think it calls -- the past question calls for speculation.

MS. DOLLARHIDE: Join.

BY MR. SHEPHERD:

Q. If you know. Do you have any idea how many statements in your declaration are incorrect?

A. No.

MS. WEISHART: Argumentative.

BY MR. SHEPHERD:

Q. How am I supposed to know how many of your answers to my questions are incorrect here today?

A. I don't know.

Q. How am I supposed to know when you're guessing, when you're just flat wrong, when you're making things up, or when you're correct? How am I supposed to know that?

MS. WEISHART: Objection; argumentative.

MS. DOLLARHIDE: Argumentative. Compound.

Argumentative.

THE WITNESS: I don't know.

. . . . [Pages 418-423]

I declare under penalty of perjury under the laws of California and Washington that the foregoing facts are true and correct to the best of my knowledge. I executed this declaration in Whatcom County, Washington on October 5, 2007.

/s/ Douglas R. Shepherd

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

WILLIAM DRISCOLL, an individual, Plaintiff, vs. CB RICHARD ELLIS, INC., a Delaware Corporation; MARK READ, an individual, JEFF WOOLSON, an individual, and WILLIAM CHILLINGWORTH; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, a Tennessee corporation, et al, Defendants.	Case No. GIC874160 SECOND DECLARATION OF DOUGLAS R. SHEPHERD REGARDING THE DEPOSITION OF PETER ROONEY

I, Douglas R. Shepherd, declare under penalty of perjury under the laws of California, as follows:

01. I am one of the attorneys for plaintiff in the above-captioned matter, am competent to testify, and make this declaration upon personal knowledge.

02. On October 1, 2007, I took the deposition of Peter Rooney in San Diego County, California. At that deposition, the following questions were asked and answers given:

Q And your profession or occupation?

A I'm president of a real estate development company.

Q By what name?

A SARES-REGIS Group.

Q And if you know, is that a partnership, a corporation, or a limited liability company?

A A partnership.

. . . . [Page 10]

Q What was the subject matter that was discussed at the presentation meeting that you're talking about?

A It was to -- for CB Richard Ellis to present their qualifications and their ideas for the future listing assignment of the Bressi Ranch.

Q Do you remember what the presentation said as regards to Mr. Driscoll's qualification?

A I do not.

Q Do you remember what the presentation said as regards to Mr. Driscoll's ideas?

A I do not.

Q Do you remember at the presentation what was said as regard to Mr. Carlson's qualifications?

A I do not.

Q But do you remember at the presentation what was said as regard to Mr. Alley's qualifications?

A I do not.

Q And do you remember what was said at the presentation as regard to Mr. Sparks' qualifications?

A I do not.

Q Do you remember what was said at the meeting as regard to Matt Strockis's qualifications?

A I do not.

. . . . [Pages 28-29]

Q Outside of working with Mr. Driscoll, what, if any, investigation did you do to determine what his qualifications were or were not?

A I did not do anything else.

. . . . [Page 31]

BY MR. SHEPHERD:

Q Do you know if any of the presentation material was put together by Mr. Driscoll?

A I do not know.

Q So the meeting you said was a good meeting?

A I do. Yes, it was very good.

Q Presentation was a good presentation?

A It was a very good presentation.

Q And you don't know who put the material together?

A I do not.

. . . . [Page 52]

Q Okay. No. 3 says, "All documents dated between January 1, 2003 and January 1, 2005 from anyone at SARES-REGIS which state, suggest, or alleged that Plaintiff Driscoll was not conversant with the details of transactions involving SARES-REGIS."

Do you see that?

A I do.

Q Do any of the documents in the pile that you just flipped to address that?

A They do not.

Q No. 4 says, "All documents dated between January 1, 2003 and January 1, 2005 from anyone at SARES-REGIS which state, suggest, or alleged that information provided or statements made by Plaintiff Driscoll demonstrated that Plaintiff Driscoll lacked sufficient knowledge regarding the marketplace."

Do you see that?

A I do.

Q Are any of these documents that you just looked through responsive to that?

A No.

Q No. 5 says, "All documents dated January 1, 2003 and January 1, 2005 from anyone at SARES-REGIS which state, suggest, or alleged that information or statements made by Plaintiff Driscoll demonstrated that he had failed to adequately answer the SARES-REGIS questions regarding sales and leasing transaction" -- during" -- "during his due diligence period."

Do you see that?

A Yes.

Q Do any of the documents that you just looked at --

A No.

Q -- responded to that?

A No, they do not.

Q No. 6 says, "All documents dated between January 1, 2003 and January 1, 2005 from anyone at SARES-REGIS which demonstrate that Plaintiff Driscoll was not conversant with the details of the transactions involving SARES-REGIS."

Are any of the documents responsive to that?

A No.

Q "All documents dated between January 1, 2003 and January 1, 2005 from anyone at SARES-REGIS which demonstrate that Plaintiff Driscoll lacked sufficient knowledge regarding the marketplace."

Are any of the documents you're looking at responsive to that?

A No.

Q No. 8 is, "All documents between January 1, 2003 and January 1, 2005 from SARES-REGIS which demonstrate that Plaintiff Driscoll had failed to adequately answer SARES-REGIS's questions regarding sales and leasing transactions during its due diligence period."

Any of the documents responsive to that?

A No.

Q "All documents between January 1, 2003 and January 1, 2005 which demonstrate that Plaintiff Driscoll disclosed he was not conversant with the details of any transactions involving SARES-REGIS."

Any of the documents responsive to that?

A No.

Q No. 10 says, "All documents dated between January 1, 2003 and January 1, 2005 which

demonstrated that Plaintiff Driscoll was not a team player."

Do any of the documents respond to that?

A No.

Q Do you think there were documents at some time that would be responsive to any one of these 1 through 10?

A No.

. . . . [Pages 59-62]

BY MR. SHEPHERD:

Q Exhibit No. 65 is an exhibit that I put the numbers on the right-hand side as regards to page -- I believe it's 14-pages long. If you look at page 10 of Exhibit No. 65, it has some signatures.

Have you seen Exhibit No. 65 before?

A You know, I -- I'm sure I have, but I don't recall the specific listing agreement.

Q Would you in 2005 be someone who would vote on behalf of SARES-REGIS Group to determine whether Mr. Thormahlen had authority to sign this document on behalf of SARES-REGIS or not?

A I think he's an officer of the LLC, so we didn't vote on his authority. But we did concur that we should sign this listing agreement with CBRE, yes.

Q Okay. Do you know if the January 7, 2005 date is correct?

MR. LEWIS: On the top of the page here?

THE WITNESS: Right. I have no reason to believe it's not correct.

BY MR. SHEPHERD:

Q Do you know if you reviewed this document before --

A I did not.

Q I need to --

A No.

Q -- finish my question.

A Oh, sorry.

Q -- before Mr. Thormahlen signed it?

A I did not.

. . . . [Pages 73-74]

Q In the document you signed, it says, Broker shall provide all personnel necessary to meet its obligations here and including but not limited to signing -- Rick -- Rick Sparks, Lannie Allee, Bill Driscoll, Matt Strockis, and Roger Carlson as the core marketing team, close quote.

Do you see that?

A I do.

Q I don't know if this alleged phone call to Mr. Sparks occurred before or after January 7, 2005.

A Before.

Q And how do you know that?

A Because it took place right after our marketing presentation.

Q Were you present at any other subsequent meetings where there was a discussion -- after the phone call to Mr. Sparks -- was there -- where there was a discussion as to when Mr. Driscoll's role would be in the core marketing team?

A We -- there was two subsequent meetings after the phone call with Rick Sparks. Bill Driscoll

called shortly thereafter, probably within a couple of days, and asked for a meeting with John and myself to discuss his ongoing involvement in the project. And so --

Q Did you --

A -- there was -- yes.

Q Did you attend that meeting?

A I did.

Q Did you at that meeting tell Mr. Driscoll that the make up of the Bressi Ranch team was up to CBRE?

A I -- I don't know how we talked about it. I think at that point Bill had been informed that he wasn't going to be on the team. Bill asked for a meeting with John and I to talk about why he should be on the team, and we took that meeting and probably spent a hour with Bill, maybe more. Bill made a very good presentation. At the end of that presentation, John and I decided that Bill should be on the team, which led to the second meeting, phone conversation with Rick Sparks, which we informed him that we had changed our mind and that Bill should be included on the team. As far as I know, that was the last meeting we had on the subject.

. . .

Q During the re-marketing of this project and after your second call to Mr. Sparks, when you said Bill should be on the team, did you ever have any conversations with the CBRE as to what Bill's role would or would not be on the team?

A Did not.

Q Did Mr. Hagestad tell you if you ever had a subsequent conversation with anybody at CBRE as

to what Mr. Driscoll's role should or should not be on the team?

A He did not tell me that he had.

. . . . [Pages 75-78]

Q Have you heard at any time that there was a concern that either Mr. Sparks and Mr. Smith, one or both of them, were sharing inside information with your competitor?

A I did hear that.

Q Where did you hear that?

A I'm sorry?

Q Where did you hear that?

A Through Bill and through my colleagues at SARES-REGIS Group.

Q Did you conduct an investigation at all to determine that belief if it was correct or not?

A I did not.

. . . . [Page 81]

Q Starting in May 2003 and going through mid-2003 when you were a successful bidder, what, if any, statements did Mr. Driscoll make as regard to what kind of profits you might be able to make from dividing the land up into lots and selling them?

A You know, I don't recall specifics. But he did -- he felt that it was a very good opportunity and that there was good profit to be made.

. . . . [Page 84]

Q You could go ahead and answer if you

understand my question.

MR. LEWIS: You can answer, but he wants – do you understand the question?

THE WITNESS: I do.

MR. LEWIS: Okay. Go ahead and answer.

THE WITNESS: At the price we were purchasing it, Bill correctly identified it was a very advantageous price, and that we would be able to resell the property at an advantageous number.

. . .

Q Do you have an opinion as to whether the seller got better advice than the buyer or that the better buyer get better advice?

MR. LEWIS: Objection. Calls for speculation.

THE WITNESS: No, I don't know.

MR. LEWIS: Improper. Hypothetical. That's fine. No foundation.

You've already answered.

BY MR. SHEPHERD:

Q You don't know?

A It was a very complicated deal.

MR. LEWIS: You've answered the question.

THE WITNESS: And I feel we got good advice from Bill. I don't know what advice the seller got.

. . . . [Pages 87-88]

Q In reviewing the documents for the deposition here today that you brought, did you find any e-mail that was critical of Mr. Driscoll and the information that [he] provide?

A No.

MS. ANOBIL: Objection. Vague and ambiguous.

BY MR. SHEPHERD:

Q Did you see any e-mail that's asking Mr. Driscoll for additional information that [he] didn't promptly respond to?

A No.

. . . . [Page 95]

Q Were you ever told in September, October 2003 that Mr. Driscoll didn't respond immediately to request for information?

A Never.

. . . . [Page 96]

Q And, again, I think you've already answered this, but did anybody inside SARES-REGIS suggest that Mr. Driscoll was not properly responding to --

A Never.

. . .

Q It says, does it not, "Dear Bill, I would like to thank you and your staff for the wonderful job you have done in complying the Carlsbad land sales analysis I surveyed in regards to the Bressi Ranch."

It says that right?

A Uh-huh.

MR. LEWIS: Yes.

THE WITNESS: Yes.

BY MR. SHEPHERD:

Q You need to say yes or no.

A Yes.

Q I greatly appreciate your group's professionalism and thoughtfulness and overtime that went into preparing these usual reports for our due diligence needs, close quote.

Do you see that?

A I do.

Q As we sit here today, and he says "your group," do you have a belief that anybody besides

Mr. Driscoll was putting this information together for you and JPMorgan?

MR. LEWIS: Objection. Lacks foundation. Calls for speculation.

If you know, give him the answer, but don't speculate.

MS. ANOBIL: Join.

THE WITNESS: I -- I believe that Bill was providing the information.

BY MR. SHEPHERD:

Q So as we sit here today, you don't believe that Mr. Carlson, Mr. Allee, Mr. Sparks, or Mr. Strockis were helping Mr. Driscoll put this information together?

A I -- I don't believe so.

Q Would you look at the next page of Exhibit No. 68, which I believe is the last page. October 6 of 2003, Larry Lukanish to Bill Driscoll,

Carlsbad information.

"Bill, I want to thank you and your team for getting all the market information for Carlsbad over to us so quickly. I know our part from JPMorgan is

very appreciative of all the hard work to get this information complied.

Do you see that?

A I do.

Q And, again, Mr. Driscoll and his team was Mr. Driscoll as far as you know, correct?

A Correct.

. . . . [Pages 97-99]

Q Okay. Did anyone, at your instruction or on their own initiative, write to Mr. Driscoll and tell him that he was providing insufficient data during the due diligence period?

A No, we did not.

. . . . [Page 100]

Q Had SARES-REGIS, as you know in the last ten years before 2003, done any work with Mark Read?

A I'm not -- not that I know of.

Q Had they done any work with Jeff Woolson?

A Not that I know of.

Q Had they done any work with Rick Sparks?

A Not that I know of.

Q Had they done any work with Matt Strockis?

A Not that I know of.

Q Did any work with Lannie Allee?

A Not that I know of.

MS. ANOBIL: I'm going to object to the term

"done any work." It's vague and ambiguous. Overbroad.

BY MR. SHEPHERD:

Q Any brokerage work -- do you understand what I'm referring to?

A Not that I know of.

Q Any brokerage work with Roger Carlson?

A Not that I know of.

Q So in the San Diego area, the first broker,

you worked with, with Mr. Driscoll; is that correct?

MR. LEWIS: In ten years.

THE WITNESS: In ten years.

. . . . [Pages 112-113]

If you know, in the past ten years, had SARES-REGIS worked with Lannie Allee in any project?

A Not that I know of.

Q Before Bressi Ranch?

A Not that I know of.

Q And since Bressi Ranch, have you worked with Lannie Allee on any project?

A I think he's been hired on another project where we had a vacancy in Vista, California.

Q Is that a sublease?

A It's a lease of an existing space that JPMorgan owns.

Q Since Bressi Ranch, have you worked with Mr. Driscoll on any project?

A Yeah. Bill introduced me to some others in CB who work the Otay Mesa area and we've since bought some land in Tijuana through them.

Q And was that the 2005 time frame?

A Probably. That sounds about right. We've owned it for a couple years.

. . . . [Page 115]

BY MR. SHEPHERD:

Q What, if any, role did you play in working with CBRE for the marketing or the remarketing of Bressi Ranch?

A Only the initial stages of who should be on the marketing team and who -- what marketing team to pick.

I did not get involved once that was over with regards to the marketing material like what you have in your hand.

Q Okay. So we talked about a first phone call to Mr. Sparks and a second phone call to Mr. Sparks. I want to make sure I got your testimony this morning correct.

You didn't call anybody else at CBRE after the second phone call to Mr. Sparks; is that correct?

MS. ANOBIL: Objection. Vague and ambiguous.

BY MR. SHEPHERD:

Q And talk about the marketing team makeup?

MR. LEWIS: Yeah. I'm -- I'm a little confused, Counsel, because I think he had more than two conversations with Mr. Sparks, so maybe you

could pinpoint with more specificity or particularity which of the two conversations you're talking about.

BY MR. SHEPHERD:

Q Okay. The second conversation. I'm talking about after Mr. Driscoll came and gave you a presentation.

A Correct.

MR. LEWIS: Okay.

BY MR. SHEPHERD:

Q I understand you had a phone call to Mr. Sparks, correct?

A Correct.

Q Do you know it's your position that Mr. Driscoll could be on the marketing team, correct?

A Myself and John Hagestad.

Q Informed Mr. Sparks of that?

A Correct.

Q What, if any, contacts did you have with anybody at CBRE about the makeup of the marketing team after that phone call?

A I'm not aware of any other conversations.

. . . . [Pages 130-131]

Q Okay. Do you know Mark Read?

A I do.

Q Do you know Jeff Woolson?

A I don't -- I don't recall him.

Q Do you remember -- do you know William Chillingworth?

A I know his name, but I don't recall him either.

Q Do you believe you ever met with or talked to Mr. Chillingworth about the Bressi Ranch project?

A You know, I don't recall. Mark Read, I do recall.

Q And you don't recall ever meeting with or talking to Jeff Woolson with regard to --

A You know, the name is familiar, but Mark Read is the only manager I remember talking to.

Q Okay. How many times do you believe you talked to Mr. Mark Read about the Bressi Ranch project?

A Well, I think he was in the -- in the presentation meeting. And other than that, I don't remember talking to him. I'm sorry. We had a closing dinner, and he and I sat next to each other at the closing dinner for the Bressi Ranch. So that would be the second time, I think, I spent time with him.

. . . . [Pages 135-136]

BY MR. SHEPHERD:

Q At some point, there was a presentation meeting, correct?

A Correct.

Q Prior to that time, you'd explained to CBRE that you had problems with the team?

A Correct.

Q But it was a general term, not specifically to any person?

A Correct.

Q After the presentation meeting, you had a phone call with Mr. Sparks --

A Correct.

Q -- where you had a conversation where you were critical of Mr. Driscoll's involvement in the team, correct?

A Correct.

Q I want to know, after that telephone with Mr. Sparks or during that telephone call and prior to Mr. Driscoll's presentation to you, did anybody from CBRE call you up and ask you about your concerns about Mr. Driscoll?

A Not that I remember, no.

MS. ANOBIL: Vague and ambiguous. Overbroad.

BY MR. SHEPHERD:

Q Did anybody from CBRE call up in any manner, "support Mr. Driscoll"?

A Not that I know of.

MS. ANOBIL: Objection. Vague and ambiguous.

Overbroad.

BY MR. SHEPHERD:

Q So then you had a meeting with Mr. Driscoll where he presented his view and his position to you and Mr. Hagestad, correct?

A Correct.

Q After that, you and Mr. Hagestad made a call again to Rick Sparks, correct?

A Correct.

Q And you said as far as SARES-REGIS is concerned, Mr. Driscoll can be on the team and is back on the team?

A Correct.

Q And then the Exhibit No. 65 was prepared where his name in the contract was placed on the team, correct?

A 65 being the listing agreement?

Q Listing agreement.

A Correct.

Q Okay. Now, after the phone call to Mr. Sparks after Mr. Driscoll's presentation to you, did you have a conversation with anybody in CBRE as regard to Mr. Driscoll's role in the marketing team?

MS. ANOBIL: Objection. Vague and ambiguous.

Overbroad.

BY MR. SHEPHERD:

Q You can go ahead and answer.

MR. LEWIS: In other words -- do you understand the question?

THE WITNESS: Uh-huh.

MR. LEWIS: Are you sure you understand the question?

THE WITNESS: I think so. Can you repeat the question?

BY MR. SHEPHERD:

Q Sure. After Mr. Driscoll's presentation and after your phone call to Mr. Sparks about it, it is now your position that Mr. Driscoll could be on the marketing team, did you have a conversation with anybody else in CBRE about Mr. Driscoll's position on the marketing team?

MS. ANOBIL: Objection stands.

MS. WEISHART: Join.

MR. LEWIS: Also, object on the basis that --

are you excluding the conversation where he said that Driscoll could be back on the team, because it seems as if you're excluding that?

MR. SHEPHERD: After that conversation.

MR. LEWIS: Right. But you're not focusing on that conversation.

MR. SHEPHERD: That's correct. After that conversation.

THE WITNESS: I'm not aware of any other conversations.

BY MR. SHEPHERD:

Q This is important to me, so I might be covering it again. You might have talked to Jeff Woolson about Bressi Ranch but you have no recollection?

A No.

MS. ANOBIL: Objection. Vague and ambiguous.

THE WITNESS: I don't remember him.

. . . . [Pages 137-140]

BY MR. SHEPHERD:

Q Do you have Exhibit No. 65 in front of you which is the listing agreement?

A Yes.

Q I said I wasn't going to ask you questions about this document because you didn't prepare it and you weren't familiar with it, but is there any place in this document that you know of that the role of the five people on the core team is -- is defined?

A No, I do not.

. . .

Q Did you define in this document in here what percentage of any commission might be split between those five people?

A No. We never discussed that with CB.

Q Was that of concern to you at all?

A We just figured that was CB's internal business.

Q I'm going to hand you what's been previously marked as Exhibit No. 61. Exhibit No. 61 is a one-page letter, Mr. Hagestad to Bill Driscoll dated February 28 of 2006.

Have you seen this before?

A I have.

Q Mr. Hagestad wrote to Mr. Driscoll on February 28, 2006 saying, "I can't thank you enough for the terrific job you did getting us involved with the Bressi Ranch."

Do you see that?

A I'm sorry.

Q First sentence.

A Lost my -- yeah.

Q "I can't thank you enough for the terrific job you did for getting us involved with the Bressi Ranch."

Do you see that first sentence?

A I do.

Q Do you agree with that statement?

MS. ANOBIL: Objection. Vague and ambiguous. Overbroad.

BY MR. SHEPHERD:

Q Do you agree that he did a terrific job in getting SARES-REGIS involved in the Bressi Ranch?

MR. LEWIS: It's been asked and answered several times today. He told you what he believes already. I don't know if you want him to repeat everything he said, but he told you --

MR. SHEPHERD: I want him to deal with what happened on the other two examinations, so I might have to explain.

THE WITNESS: We may need to talk.

MR. LEWIS: Okay. You know, there's a real issue here, Counsel. You might want to -- well, you can do what you want of course, but this is better suited for Mr. Hagestad. This was not written by this witness.

MR. SHEPHERD: I just want to see if he agrees or disagrees with it.

MS. ANOBIL: Sir, he can't testify – that would call for -- he can't testify to what Mr. Hagestad was thinking. I mean --

BY MR. SHEPHERD:

Q Do -- do you agree that Mr. Driscoll did a terrific job in getting SARES-REGIS involved in the Bressi Ranch?

MS. ANOBIL: Vague and ambiguous.

THE WITNESS: We need to talk.

MR. LEWIS: All right.

MR. SHEPHERD: All right.

MR. LEWIS: All right.

MS. WEISHART: I'm sorry. I didn't hear that.

MR. LEWIS: We need to talk.

MR. SHEPHERD: He wants to talk about his answer before he answers.

THE VIDEOGRAPHER: Off the record. The time is 2:52 p.m.

(A brief recess was taken.)

THE VIDEOGRAPHER: Back on the record. The time is 2:58 p.m.

BY MR. SHEPHERD:

Q I'm going to hand you what's been marked as Exhibit No. 62.

MR. LEWIS: 62 or 1?

MR. SHEPHERD: 62.

MR. LEWIS: Pardon me. I don't have 62 then. Thank you.

MS. ANOBIL: Can I get a copy of that too, please?

MR. SHEPHERD: By all means. Since this was a prior exhibit, I only brought a copy for the witness's counsel.

BY MR. SHEPHERD:

Q This is a transcription of some portions of a meeting for SARES-REGIS group corporate retreat on March 10 of 2006.

Did you attend that meeting?

A Sorry. Repeat that.

Q This is partial transcript of a meeting for SARES-REGIS group corporate retreat where Mr. Driscoll gave a speech --

A Yes, I did.

Q -- on March 10, 2006.

The tape that we had which has been provided has you when John Hagestad's sentence concludes our program that you yelled out "Bressi Ranch" to Mr. Hagestad.

Do you remember doing that?

A No, I don't.

Q And then --

MR. LEWIS: He was drunk. No, no, that's just a joke, please.

BY MR. SHEPHERD:

Q Mr. Hagestad said, "Bill Driscoll has definitely brought us the Bressi Ranch, not only brought us the Bressi Ranch but insisted that we buy it. People have given me credit for being wise and knowledgeable person. It's really Bill Driscoll who convinced me, convinced us that was the right thing to do. Hugely successful projects. And, Bill, again thank you very much for your patience, your knowledge, your wisdom, and your persistence. Thank you."

Do you remember that exchange?

A You know, I don't but it -- it's very plausible that John said that. I think he believes that.

Q Do you believe that?

A I do.

. . .

BY MR. SHEPHERD:

Q And it was your understanding that Mr. Allee would be the lead person, the point of contact; is that correct?

A That is my understanding.

Q Now, you said -- and I think you kind of got cut off or you stopped, but you assumed that Bill would be on the team because he was the procuring broker, correct?

A Of the original team, yes.

Q So when the team was first put together, it didn't surprise you from your knowledge of custom and practice in the industry that he would be on the team, did it?

A No, it did not.

. . . . [Pages 185-191]

BY MR. SHEPHERD:

Q Now let's talk about land transactions. Mr. Driscoll was the one that brought this land transaction, Phase 1, to you, correct?

A Correct.

Q And he's the one that represented you as the buyer during this land transaction?

A Correct.

. . . . [Page 193]

Q Do you know what Mr. Read told Bill Driscoll was to be his involvement in the Bressi Ranch?

A No idea.

Q Do you know what Mr. Woolson told him to be his involvement in that?

A No idea.

MS. ANOBIL: Objection. Vague and ambiguous. Calls for speculation.

BY MR. SHEPHERD:

Q Do you know if after the second phone call to Mr. Sparks when you told him that you wanted Bill Driscoll to be involved in the team if you expected him to tell Mr. Read and Mr. Wilson that?

MS. ANOBIL: Objection. Vague and ambiguous.

THE WITNESS: We told Rick Sparks. I don't know what -- who he told. I didn't know he was talking to Mark Read or he's talking to Bill directly. I don't know.

BY MR. SHEPHERD:

Q Well, did you expect it would just stay with him --

A No.

Q -- or did you think CBRE would know that you wanted him involved?

A I expected him as kind of the team leader at that point to get somebody -- to -- to get it happen. But the time before, the couple of days before when he said, "We didn't want Bill involved," it obviously happened. Bill came and met with us. We then called Bill and said, "Bill, we think we made a mistake. Put him back on the team. We expected it to happen."

MR. LEWIS: You mean you called Rick?

THE WITNESS: We called Rick. Sorry. We called Rick.

. . . . [Pages 196-198]

I declare under penalty of perjury under the laws of California and Washington that the foregoing facts are true and correct to the best of my knowledge. I executed this declaration in Whatcom County, Washington on October 6, 2007.

/s/ Douglas R. Shepherd

UNUM Questionnaire
RE: William P. Driscoll
Completed by: Mark M. Read (Senior Managing Director, CB Richard Ellis)
(858) 646-4740 Phone

1. Date hired and job title.

   William P. Driscoll was hired on November 2, 1981 as a Sales Assistant in our Carlsbad office.

2. Job duties. Please give a clear indication of the amount of physical exertion required of Mr. Driscoll is the performance of his duties. This should include the amount of bending, climbing, lifting required and the percentage of the time he spent daily on each work activity.

   a. Please include a detailed job description and the number of his direct reports.

   Mr. Driscoll is a fully commissioned salesperson for CB Richard Ellis, Inc. He negotiates sale and lease transactions for his clients. He does not have any direct reports.

3. What was the amount of Mr. Driscoll's monthly income from 2001 to the present and what is this figure based on? For example, was it strictly commission, salary plus commission, a monthly draw based upon anticipated future commissions? Please fully explain.

Mr. Driscoll is a strictly commissioned salesperson. History of earnings as follows:

2001 YTD Income - $32,884
Income through 11/02 - $5,650

4. If Mr. Driscoll worked under the terms of an employment contract, please provide a copy of that contract.

   Copy of contracts attached.

5. Over the past 23 years, were there any significant changes in Mr. Driscoll's job duties or responsibilities? If so, please describe the changes and when they took place.

   There have not been any significant changes to Mr. Driscoll's job duties or responsibilities.

6. Over the past [◆] years were there any significant changes noted in the following areas of Mr. Driscoll's job performance?

   a. ability to complete job tasks and responsibilities reasonable and on-time? No
   b. maintaining a reasonable relationship with other employees, assistants and supervisors? No
   c. attending and leaving work at the expected times? No

7. Did Mr. Driscoll stop, reduce or increase his work schedule in the past 2-3 years? If so what is your understanding of why. In which way did he modify his work schedule and when were any changes made.

   Our sales professionals manage their own work schedules.

8. What is Mr. Driscoll's current employment status with your Company?

   Mr. Driscoll is currently a salesperson in our Carlsbad office.

9. If applicable, would you rehire Mr. Driscoll? If not, please provide your reasons.

   N/A

10. If Mr. Driscoll is on medical leave, is his job or another position available to him to return to?

    Mr. Driscoll is not on medical leave.

11. What pre-conditions, if any, must Mr. Driscoll satisfy should he desire to return to work in the near future? Would it be possible for him to return to work on a gradual or incremental basis until he is able to resume full-time work?

    Mr. Driscoll is not on medical leave.

12. Has a worker's compensation claim been filed? If so, when was it filed? Please provide the name, address and policy no. of your worker's compensation carrier.

    N/A

13. Does your company provide its employees with group benefits for non-occupational disabilities. If so, please provide the name and address of your insurance carrier. Indicate whether a claim has been filed with them and when.

    STD UNUM Provident Corporation
    2211 Congress Street
    Portland, ME 04122
    800-252-2091

14. What is the name, address and policy no. for your group health insurance carrier?

    CIGNA
    1-800-HPCIGNA
    Group 2403539/QLDS-01
    For medical claims PO Box 5047, Visalia, CA 93278

15. Is Mr. Driscoll a member of any professionals organizations? If so, please indicate their names and addresses and whether he promotes the Company within these organizations as part of his job responsibilities.

N/A

16. Please provide any statistics or other information you may have concerning the performance of the commercial real estate market in San Diego County from 1990 to the present.